

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

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|-------------------------------|-----------------------|
| STUDENTS FOR FAIR ADMISSIONS, |) Trial Day 7 |
| |) |
| Plaintiff, |) |
| |) Civil No. |
| vs. |) 1:23-cv-2699-RDB |
| |) |
| THE UNITED STATES NAVAL |) Baltimore, Maryland |
| ACADEMY, ET AL., |) |
| |) September 24, 2024 |
| Defendants. |) 10:03 a.m. |
| |) |

TRIAL IN THE ABOVE-ENTITLED MATTER CONTINUED
BEFORE THE HONORABLE RICHARD D. BENNETT

A P P E A R A N C E S

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INDEXSeptember 24, 2024PLAINTIFF'S WITNESSES:PAGE:

Jason Lyall - cont.

Direct by Mr. Robinson (continued)
Cross by Mr. Strawbridge3
40

Admiral John Fuller

Direct by Mr. Carmichael
Cross by Ms. Wyrick89
123

Stuart Gurrea, Ph.D.

Direct by Mr. Gardner
Cross by Mr. Mortara
Redirect by Mr. Gardner133
189
226

1 (10:02 a.m.)

2 **THE COURT:** Good morning, everyone.

3 Jakiba, if you'll reswear Dr. Lyall, please.

4 **THE CLERK:** Absolutely.

5 If you'll raise your right hand, sir.

6 (Witness sworn.)

7 **THE CLERK:** Do you mind restating and spelling your
8 first and last name for the record, please.

9 **THE WITNESS:** My name is Jason Lyall. That's
10 J-A-S-O-N; Lyall is L-Y-A-L-L.

11 **THE COURT:** Good morning, Dr. Lyall.

12 Mr. Robinson, you may continue.

13 **MR. ROBINSON:** Thank you, Your Honor.

14 **DIRECT EXAMINATION - CONTINUED**

15 **BY MR. ROBINSON:**

16 **Q.** Good morning, Professor Lyall.

17 So yesterday we were talking about Project Mars. You and
18 your team looked at hundreds of armies, hundreds of battles to
19 see whether there's a relationship between inequality and
20 battlefield performance. And we were talking, I think when we
21 dropped off, about the military and equality coefficient, the
22 first step in your analysis.

23 Could you just explain for the Court briefly again what
24 this is and how it's calculated for each army you looked at.

25 **A.** Sure.

1 So the military inequality coefficient, or MIC, is
2 designed to take a snapshot of an army's demography and the
3 level of inequality on the eve of battle. So for every army in
4 the dataset, we take this snapshot. And this is essentially
5 how we calculate it. It's two pieces of information.

6 We look at the ethnic composition of the army -- so how
7 many ethnic groups are in it and what percentage they represent
8 of the military -- and then how the state is treating them.
9 And we have a range there of options from the state viewing
10 that ethnic group as full members of the political community.
11 They enjoy all political rights, economic freedoms. In some
12 cases, though, states discriminate. And so in those particular
13 instances, we assign a value of a .5.

14 In some instances, ethnic groups are actually subject to
15 violence by their own states. In that instance, we assign a
16 value of a 1.

17 So, basically, what you're looking at here is it's very
18 simple. This is a hypothetical army. It has two ethnic
19 groups, Ethnic Group A, Ethnic Group B.

20 Ethnic Group A represents 80 percent of the fielded army
21 going into battle. Ethnic Group B represents 20 percent. For
22 whatever reason in this particular hypothetical example, the
23 government is discriminating against Ethnic Group A. That's
24 what that .5 value is. And, for whatever reason,
25 Ethnic Group B here is seen as full citizens of the state and

1 they would be assigned a 0.

2 Then it's just simple calculation. And it generates in
3 this particular instance a MIC value of .4. And we do this for
4 every single army in the dataset. And that generates a scale
5 between 0 and 1. And so this army would be somewhere near the
6 midpoint of that particular scale.

7 **Q.** Thank you.

8 So now I'd like to turn to your conclusions, what you
9 found when you ran the analysis.

10 If we could put up Lyall 4.

11 This is from Table 1 in your expert report. And could you
12 describe at a high level using this table what you found.

13 **A.** Absolutely. So --

14 **THE COURT:** This is still Defendants' Exhibit 195? Is
15 that what we're looking at?

16 **MR. ROBINSON:** This is from 195. This is a
17 demonstrative that just calls --

18 **THE COURT:** I'm just verifying it's Defendants'
19 Exhibit 895 and a demonstrative from that.

20 **MR. ROBINSON:** Yes.

21 **THE COURT:** Okay. Thank you.

22 **THE WITNESS:** So this is basically the Project Mars
23 data in a summary table. And what it tells us here, we assign
24 a level of inequality from the military inequality coefficient
25 that goes between low, medium, high, and in extreme values.

1 And then what you're looking at here is the various
2 measures that all of the coders who are working to collect the
3 data use to define battlefield performance. And, in
4 particular, we see four of them here.

5 You see whether your army has a loss-exchange ratio below
6 parity. That simply means that your army is losing more
7 soldiers than it's killing on the other side.

8 Mass desertion. That means at least 10 percent of your
9 army has taken its weapons and gone home.

10 Mass defection. That is 10 percent of your army has taken
11 its weapons and joined the other side and is fighting against
12 you.

13 And the last column there is blocking units. This is the
14 use of violence against your own soldiers to force them to
15 fight.

16 The basic relationship we see in here is, as the army
17 becomes more unequal on these scores -- so as you move from low
18 through medium to high and then eventually to extreme -- the
19 odds that these behaviors are going to be manifest in your army
20 increase.

21 And so as you move up the scale, greater likelihood that
22 your army will suffer more casualties than it inflicts, greater
23 likelihood that you're going to see mass desertion, greater
24 likelihood of mass defection, and greater likelihood that that
25 army is going to turn its weapons against its own soldiers.

1 **BY MR. ROBINSON:**

2 **Q.** So taking loss-exchange ratio, for example, could you just
3 walk through that example using loss-exchange ratio, how the
4 data shows that, as your army gets more unequal, there's a
5 higher likelihood of that happening?

6 **A.** Absolutely. So if we just look at the LER below parity,
7 or loss-exchange ratio below parity column, we see for the
8 first line there armies that have a low level of inequality
9 have a loss-exchange ratio below parity about 25 percent of the
10 time.

11 When you have an army that has a medium level of
12 inequality, now you see about 45 percent of those armies will
13 have casualties below parity. That means they're losing more
14 soldiers than they're killing on the other side.

15 When you go to high, you will see that jump again to
16 66 percent.

17 And when you go to the extreme column, which is some
18 really unequal or really divided armies, you'll see 75 percent
19 of those armies recorded losses that were below parity. That
20 means they're losing, again, more soldiers than they're killing
21 on the other side.

22 **Q.** You talked about four battlefield measures that you looked
23 at: loss-exchange ratio, mass desertion, mass defection,
24 blocking units.

25 **A.** Yes.

1 Q. You see a column on the right there. It says "BP index."
2 What is that?

3 A. Yeah, so this is the battlefield performance index. One
4 of the things we noticed, when we were doing the analysis, is
5 that it's not just that one of these pathologies might appear
6 in your military; it's that, as you get up the scale, you go
7 from medium to high to extreme, multiple pathologies are going
8 to begin emerging in your military.

9 So we wanted some kind of index that records the number of
10 events of these four that are going to happen inside your
11 military. And that's all the index is. The index, every army
12 begins with 1. That's the best score. And for every one of
13 these pathologies or behaviors that we see on the battlefield,
14 we just take away .25. So it goes back down to 0.

15 You can see here on the low inequality armies, they have
16 the highest battlefield performance index. That means they're
17 doing the best. The extreme, they're doing quite poorly. They
18 have a .34. That means that, roughly, they're going to be
19 seeing two to three of these behaviors inside their army.

20 So the idea here is that inequality is correlated or
21 associated with these negative behaviors individually but that,
22 as you become more extreme, more of these behaviors are also
23 going to be appearing in your military.

24 Q. Thank you.

25 I think we have a graphical representation of this from

1 your report. If we can go to Lyall 5. This is also from
2 DX195, Figure 1. It's just blown up.

3 What are we looking at here, Professor Lyall?

4 A. Okay. So these are actually the statistical results from
5 Project Mars when we actually begin to do the regression
6 analysis.

7 And just to orient ourselves, again, these are the four
8 behaviors I just explained. So the top left box is the
9 probability that your army is going to have a loss-exchange
10 ratio below parity. Again, it's losing more soldiers than it's
11 killing.

12 Top right box is the probability of mass desertion out of
13 your army. Bottom left, probability of mass defection. And
14 then the probability of using violence against your own
15 soldiers, that's the bottom right box.

16 What we're seeing here is, along the X axis, the bottom
17 axis, that's the level of inequality in your army. That's the
18 MIC scores which we generated.

19 And then running up the Y axis, or the side, that's the
20 probability that that event is going to happen to your army.

21 Every one of those gray circles is one of the armies in
22 the dataset. The blue line is the average pattern that we see
23 in these data when we run the statistics.

24 So, again, if we want to stay with the loss-exchange
25 ratio, the top left box, we see, as inequality increases, you

1 see a greater likelihood that your army will be suffering an
2 unfavorable loss-exchange ratio.

3 You see this S curve kind of looking pattern in all four
4 boxes. What that suggests is, again, as your inequality rises,
5 the greater likelihood that you're going to experience these
6 behaviors on the battlefield. And you'll note as you get out
7 really quite close to .7 or .8, it's almost a near certainty
8 that your army will have these particular behaviors.

9 The one thing I should mention is that, when we do this
10 regression, this is the line or the relationship we see between
11 inequality and these four battlefield behaviors when we're
12 using controls for alternative explanations. So this is not
13 just looking at military inequality itself; this is controlling
14 for other aspects of the armies engaged, how big they were, the
15 nature of their political system, and things like that. So
16 this is controlling for alternative explanations as well.

17 **Q.** What, if anything, did you do to ensure the reliability of
18 this data and the robustness of these results?

19 **A.** So we took a number of different steps. So I mentioned, I
20 guess, yesterday that we had a series of teams to collect the
21 data. So we would have an initial blue team who would collect
22 the data, and then we would have a red team of trained coders
23 who would audit the data to see if there were mistakes or
24 historical judgments or disagreements and to reconcile those
25 two between them.

1 We provided confidence intervals for our assessment of how
2 sure we were about the data that we were entering. That was a
3 four-point scale that the coders could input.

4 And then the dataset Project Mars itself is compatible
5 with other datasets. And so we can rerun these numbers and
6 this relationship on other datasets to see if we see it again
7 as a robustness check just to make sure that we see this
8 pattern across other datasets.

9 And so there's a series of sort of data clearing and
10 quality procedures put in place.

11 Q. Are the results of Project Mars presented in your book,
12 "Divided Armies"?

13 A. Yes.

14 Q. And when was this published?

15 A. In 2020.

16 Q. Has this research been the subject of review or scrutiny
17 by other researchers since it's been published?

18 A. It has, yes. It has received multiple awards. It was the
19 subject of a roundtable at the American Political Science
20 Association annual conference. It was subject to a roundtable
21 that was published.

22 The data has now been entered into something called Our
23 World in Data, which is housed at Oxford University. It is a
24 clearinghouse for high-quality data on conflict. And it has
25 been downloaded, I believe, somewhere in the neighborhood of

1 5,500 times, something along those lines.

2 So it has received favorable reviews in academic
3 peer-reviewed kind of articles and journals and things like
4 that and has been subject -- like anything, trying to be --
5 this is a high-profile book in some ways. I'm trying to raise
6 a new argument in some ways. It has received pushback from one
7 set of researchers who objected to some of the decisions I made
8 in it.

9 Q. Could you say just a little bit more about that pushback?
10 Who it was, what they said, your response?

11 A. Yes. So -- sorry.

12 So two professors basically wrote a short review of the
13 data. And they had questions about how I constructed the data.
14 And in particular they wanted me to use their favored dataset
15 and to see if my numbers were robust on that. And so the
16 editors accepted their letter critiquing my work and asked me
17 to write a rebuttal.

18 And so I did so. And it's a sort of normal academic
19 exchange in some ways, where someone criticizes and then we
20 respond. And hopefully we shed more light on the particular
21 subject.

22 Q. Did that criticism affect your overall conclusions in any
23 way?

24 A. No. If anything, they actually reinforced them because
25 some of the suggested tests that they asked me to do actually

1 confirmed the relationship I'm seeing in the book and in my
2 data or actually holding in other datasets as well.

3 Q. So there are lots of armies and battles represented on
4 this graphic. Could you provide just, like, a real-world
5 example of an army with high inequality suffering a high
6 loss-exchange ratio.

7 A. Yes. Absolutely.

8 So if we can indulge me in a historical example here for a
9 moment, I would take us back to what was called the Mahdiyya,
10 which would be -- in 19th Century -- today it would be in Sudan
11 and South Sudan -- was a powerhouse at the time. Built an
12 inclusive army, salvaged weapons from the battlefield, and
13 managed to drive out the British and create their own state
14 called the Mahdiyya.

15 And on the eve of the power of this new state, the leader
16 dies, gets typhoid, passes. There's a succession struggle.
17 And a new ruler comes called the khalifa, or the successor, who
18 decides he's not going to rule in an inclusive fashion. He's
19 actually going to rule a narrow ethnocracy along his tribal
20 lines.

21 And he begins subjecting the population of the Mahdiyya to
22 near-genocidal levels of violence, even as he's trying to build
23 an army from the same populations that he's actually subjecting
24 them to famine and violence. Eventually the British come back,
25 and he's faced now to send his army into the field. Sky-high

1 levels of inequality.

2 He's forced to keep his soldiers in narrow ranks because
3 he doesn't trust them because they're going to flee; they're
4 going to desert. So he builds a special blocking unit, these
5 special units, to stand behind his soldiers to force them to
6 fight.

7 Basically, the British, when they would do their
8 after-action review, reported seeing soldiers chained to the
9 ground so they could not flee. So he's holding his army just
10 barely together in order to fight the British. And, of course,
11 he meets the British not only -- who are superior in some ways
12 in tactics but also technology. They have the Maxim machine
13 gun.

14 And he leads his incredibly high army -- incredibly high
15 inequality level into the perhaps most lopsided military defeat
16 in recorded history, and certainly one of the ones in the
17 dataset. The Mahdiyya would lose about 220 soldiers for every
18 one that they killed on the other side.

19 And this is seen as one of the most sort of graphic
20 examples of a loss-exchange ratio well below parity. And so
21 that's the dangers of going from an inclusive to a highly
22 exclusive military.

23 Q. What about an example from the United States?

24 A. Yes. So United States as well, we could take evidence
25 from the American Civil War, for example. There's wonderful

1 accounts now of really interesting quantitative work looking at
2 soldier records from the Union Army and looking at causes of
3 desertion and arrest.

4 And we have actually the rosters of all the soldiers. And
5 we know where they were born and we know where their hometowns
6 were and things like that. And it turns out that, when you run
7 the numbers there, that Irish-born, for example, had a two to
8 three times higher rate of desertion and arrest than did sort
9 of so-called at the time native-born Americans.

10 Why? At the time -- if you remember back at the time of
11 the Civil War, the Irish were seen as second-class citizens,
12 subject to discrimination. And so oftentimes, when they would
13 get onto the battlefield, they would use the opportunity not to
14 fight but to flee.

15 Q. Thank you.

16 So now I'd like to turn to some of your specific opinions
17 in this case.

18 If we could go back to Lyall 1.

19 This is the demonstrative with your opinions. Can you
20 just restate again for the Court your first opinion.

21 A. My first opinion is that racial and ethnic diversity is an
22 advantage in modern combat.

23 Q. So, first, I want to ask you what you mean by "modern
24 combat" in that statement.

25 A. So modern combat refers -- this is a political science

1 definition, typically, that refers to uniformed armies engaging
2 in high-intensity warfare against one another, typically with
3 front lines, typically with armies that exercise some degree of
4 specialization. So there would be infantry, artillery, tanks
5 and things of that nature.

6 They're working in combined arms on a lethal battlefield,
7 where the central challenge is to keep your soldiers safe while
8 inflicting devastation and damage on the other side. And the
9 modern combat is also marked by a high degree of uncertainty,
10 low information, and very high task complexity. So it's very
11 challenging.

12 Q. And what is your opinion on how diversity and inclusion
13 can affect battlefield performance in modern combat?

14 A. So I believe that racial and ethnic diversity is an
15 advantage in modern combat for multiple reasons.

16 Q. So I'll get to the bases for that opinion in a moment.
17 But you just gave an example of an army that was highly unequal
18 and suffered a lower loss-exchange ratio. Could you give a
19 historical example of an army that managed diversity well and
20 that paid dividends?

21 A. Yes. Absolutely.

22 So managing diversity is not a new phenomenon. This is
23 something -- as Dr. Haynie suggested yesterday, war is the
24 human condition. Armies have been diverse across time. And so
25 many of the leading examples we cite from the historical canon

1 being exemplars of military proficiency -- the Roman Empire,
2 for example, is cited as an excellent -- obviously, an empire
3 that lasted for a long period of time.

4 One of its keys to success was its inclusive policy in its
5 ranks and its ability to integrate various foreign populations
6 inside its auxiliary corps so that it could use those as local
7 forces that had the information of the local conditions, the
8 language skills, things of that nature, and would promise
9 military service for citizenship. And so the Romans, for
10 example, are one example of that.

11 The Greek armies have often been cited as another example
12 of inclusive and high military proficiency from ancient
13 history.

14 Q. So now I want to turn to the basis for this first opinion.
15 Is there academic research that supports your opinion that
16 racial and ethnic diversity is an advantage in modern combat?

17 A. Yes.

18 Q. And what does the research say about the possible
19 advantages of racial and ethnic diversity?

20 A. It suggests that there is multiple advantages on the
21 battlefield, that it helps with task complexity and
22 problem-solving, and it can help with creativity and innovation
23 on the battlefield, for example.

24 Q. So I think we have a demonstrative listing these. This is
25 Lyall 6. So this is again from your report, the diversity

1 bonus. So can you take the Court through this demonstrative,
2 what this means.

3 A. Sure. So there's at least four sort of factors that
4 diversity is thought to help on the battlefield or where it
5 would carry over onto the battlefield.

6 The first is, again, as I mentioned, improved
7 problem-solving. Diverse groups, diverse teams have a -- sort
8 of a cultural or a cognitive repertoire that they can draw from
9 that helps them avoid groupthink. They can be more innovative,
10 more flexible in how they approach problems. It also might
11 speed innovation within the group when you have multiple
12 perspectives working together.

13 Third, there's evidence to suggest that this bolsters
14 resiliency and adaptation to surprise. So, again, you have
15 multiple viewpoints in a particular group, and that can help
16 you overcome, say, battlefield shock or surprise.

17 And then, fourth, having diverse organizations or teams
18 can help enhance the legitimacy and public support for the
19 institution, and here really referring to the military as well.

20 Q. You said you were here in the courtroom yesterday when
21 Dr. Haynie was talking about some of the research about these
22 bonuses?

23 A. I was, yes.

24 Q. Can diversity impose costs on an army?

25 A. Yes. Absolutely.

1 Q. Can you explain?

2 A. Sure.

3 So diversity itself is only one key kind of part of the
4 success. Without the inclusion piece, you cannot access the
5 advantages generated by diversity.

6 So if we're just talking about diversity and you're
7 throwing a large number of different kinds of people together
8 without an inclusive environment, you will have what economists
9 refer to as transaction costs.

10 So they may speak all different languages, they have a
11 harder time coordinating with each other, cooperating with each
12 other. You may put people in who don't like each other and
13 have mutual antagonisms. And so, again, if there isn't this
14 inclusive environment, you can actually generate friction
15 inside the teams.

16 One of the things we can do with the Project Mars data is
17 actually look at just the raw number of armies in a group --
18 sorry -- raw number of ethnic groups in a military to see if
19 that has any negative effect on combat performance. And there
20 is a very small negative effect. As the number of groups in
21 your armies increases, there's a small negative effect on
22 certain aspects of battlefield performance.

23 And so if you don't have that inclusive environment to
24 harness it, diversity can be problematic, yes.

25 Q. Now, earlier you talked about some of the other factors

1 that can affect battlefield performance. I think you mentioned
2 the size of the military, technology, for example.

3 Is it your opinion that diversity and inclusion are more
4 important than those factors?

5 A. No.

6 Q. So what is your opinion?

7 A. So my opinion is that diversity is one key aspect of
8 battlefield performance. It is certainly not the only one.
9 War is complicated. There's no one sort of solution or one
10 variable that's going to lead to success in all instances.

11 I just know that when we run the regressions with
12 competing explanations in it for army size or whether you're a
13 democracy or not, diversity and inclusion still remain
14 statistically significant in there. And so I do believe that
15 it is an important factor; it's just not the only one in
16 driving success.

17 Q. Thank you.

18 We can take down this slide.

19 You've been talking about diversity and inclusion
20 generally. Do you think diversity and inclusion are important
21 for the officer corps specifically?

22 A. Yes, I do.

23 Q. Why?

24 A. So officers occupy a special position in being able to
25 create the climate of inclusion so that you can harness the

1 diversity. So officers are culture carriers. They set the
2 tone. They set the ability to access the advantages of
3 diversity. Without their buy-in, they can throw away
4 essentially the diversity bonus.

5 Also, in terms of the legitimacy of the organization, if
6 the enlisted look at the officers and see themselves as not
7 represented among them, that can lead to friction inside the
8 military. And so having officers who are able to access the
9 enlisted and who can serve as not just culture carriers but
10 symbols for the enlisted, I think is equally important.

11 Q. Thank you.

12 Turn now to your second opinion.

13 If we could put Lyall 1 back up.

14 And if you could remind the Court of your second opinion.

15 A. My second opinion is that racial inequality presents risks
16 of adverse consequences.

17 Q. Did you rely on the Project Mars research that we
18 discussed earlier in reaching this opinion?

19 A. I did, yes.

20 Q. As an expert on diversity and inclusion in battlefield
21 performance, do you have an opinion on why military inequality
22 undermines battlefield performance?

23 A. I do, yes.

24 Q. All right. And I think we have a slide on this from the
25 report. This is Lyall 7.

1 Can you take us through these risks of inequality that you
2 presented in your report.

3 A. Absolutely.

4 So we can think of inequality inside your military as a
5 poison that's corroding it in some ways from the inside out.
6 And it has four negative consequences inside your military.

7 The first is that, if you've got high levels of
8 inequality, it undercuts the belief that all the groups within
9 the military share that same fate, share that same risk that
10 they're going to face on the battlefield. There's nothing more
11 corrosive than believing that your officers don't value your
12 life.

13 This is obviously going to then lower the morale within
14 the military among those groups that have been subjected to
15 discrimination or repression.

16 The second reason, sort of building on the first one, is
17 that inequality will reinforce these existing grievances among
18 discriminated and repressed groups.

19 One of the key things we see from the case studies in the
20 book and in our documentation when we were collecting material
21 is the complaints by the discriminated and repressed groups
22 that this isn't our war, that we shouldn't be -- this isn't our
23 fight. And so it reinforced existing grievances against the
24 state.

25 The third thing that inequality can do is lower trust

1 between the ethnic groups in your military. So if you have
2 different statuses, they may not trust one another sort of
3 horizontally. But you also break down trust between the ethnic
4 groups and their officers. If the officers are all of one
5 group, the privileged group perhaps, and the enlisted are from
6 a discriminated or repressed group, trust will break down.

7 As we've seen repeatedly in these studies and Dr. Haynie's
8 testimony yesterday, trust is essential for a military to be
9 able to perform on the battlefield. Inequality can destroy the
10 trust necessary to be lethal on the battlefield.

11 The final thing is that pride, discrimination, and
12 repression can actually strengthen the bonds of the groups that
13 have been exposed to repression. So we often think of soldiers
14 coming into militaries, we think of them in some ways as blank
15 slates, and we just impose that now they're soldiers; they were
16 civilians, and now they're soldiers. But they come into the
17 military, and they still have identities from the outside.

18 Prior exposure to violence makes them turn inward and
19 build networks for survival that often persist inside the
20 military. So when they get battlefield opportunities, they
21 don't rally and say, Hey, let's fight for the state that's
22 repressing us; they say, Hey, we should actually use this
23 opportunity to escape.

24 So one of the things that repression can do is build these
25 bonds that allow these soldiers to desert. One of the things

1 we see in the data is that desertion, as you get up on the
2 scale of inequality, it's not ones and twos; it's large groups
3 organizing together to escape. And they're using these ethnic
4 bonds and these prior experiences of repression and
5 discrimination to mobilize and to flee.

6 Q. Professor Lyall, do you think that some of these risks are
7 relevant to the United States military today?

8 A. I do, yes.

9 Q. Why?

10 A. So the United States military has made tremendous strides
11 in trying to address issues of inequality within the ranks on
12 racial and ethnic grounds, but it has not made it all the way
13 there yet and there is a potential for discrimination still in
14 the ranks; and if that's happening, then some of these
15 pathologies may also be present.

16 Q. How do you know that?

17 A. The U.S. military, to its credit, conducts large-scale
18 surveys of attitudes among both its active duty and reservist
19 soldiers, and we can see it asks batteries of question about
20 exposure to discrimination.

21 Q. So I think we have some of those surveys. I think you
22 cite them in your report.

23 A. I do.

24 Q. Let's take a look at Defense Exhibit 75. This is already
25 in evidence.

1 Is this one of the surveys you were referring to?

2 A. It is, yes.

3 Q. And which one is this?

4 A. This is the 2017 workplace and equal opportunity survey of
5 active duty members; so this is the active duty component.

6 Q. And we've looked at some other publications from the
7 department's Office of People Analytics in this case.

8 Is this another publication from that office?

9 A. It is, yes.

10 Q. Can we take a look at page 20 of this report. And if we
11 can blow up the bottom paragraph there, starting with "overall,
12 about one in five."

13 Does this display the department's top-line findings in
14 this study?

15 A. Yes, it does.

16 Q. And could you just read into the record what it says
17 there?

18 A. Sure.

19 "Overall, about one in five active duty members
20 (178.9 percent) indicated experiencing racial and ethnic
21 harassment and/or discrimination in the 12 months prior to
22 taking the survey. Black (31.2 percent) and Asian
23 (23.3 percent) members were more likely to indicate
24 experiencing racial and ethnic harassment discrimination than
25 other active duty members, whereas White members (12.7 percent)

1 were less likely. Overall, total minority (24.4 percent)
2 members were more likely to indicate experiencing racial and
3 ethnic harassment/discrimination, whereas White members
4 (12.7 percent) were less likely. Because this metric was new
5 to active duty members in 2017, trend year comparisons were not
6 possible."

7 Q. Could we take a look at page 23 of this report.

8 Does this indicate here how many incidents of harassment
9 or discrimination involve leaders or officers?

10 A. It does, yes.

11 Q. And if we could blow up maybe that box in the bottom
12 left-hand side.

13 It's a little hard to read, but what does it say there
14 about the characteristics of the alleged offenders?

15 A. It says 53 percent were in a leadership position.

16 Q. Thank you.

17 We can take this down.

18 Professor Lyall, in your opinion, do those statistics that
19 you just referenced likely overreport or underreport incidents
20 of discrimination?

21 A. In my view, they likely underreport.

22 Q. Why is that?

23 A. First of all, this is, obviously, a sensitive topic and
24 people may feel unwilling to give either answers to it on this
25 particular instance, but probably more relevant is the fear of

1 retaliation if they do report.

2 Q. Have there been studies on why minority soldiers and
3 sailors fail to report harassment?

4 A. Yes.

5 Q. Are these racial disparities present elsewhere in the
6 military to your knowledge?

7 A. They are as well, yes.

8 Q. In what context?

9 A. In the military judicial system, non-Whites are typically
10 two to three times more likely to be referred to court, for
11 example.

12 Q. Do you know whether the military has conducted studies on
13 how different climates of diversity and inclusion can affect
14 readiness and unit cohesion?

15 A. It has, yes.

16 Q. What is an example of such a study?

17 A. So the OPA has run climate studies basically looking at
18 the degree of favorability or inclusion in the climate.

19 Q. So you were in court yesterday when Dr. Haynie and
20 Mr. Vazirani were going through one of those OPA studies,
21 correct?

22 A. Yes.

23 Q. I won't pull it up again and go through it again, but for
24 purposes of your conclusions in this case, could you describe
25 at a high level what that study found.

1 A. Yes. They typically found that units or cultures that had
2 a unwelcoming climate for minorities typically resulted in a
3 higher degree of those minority soldiers and sailors separating
4 from service.

5 Q. And you mentioned -- we talked a little bit about the 2017
6 active duty survey.

7 Did you rely on any other survey data in reaching your
8 conclusions about the relevance of today's military?

9 A. Yes, I did.

10 Q. I think we have that one that's cited in your report.
11 It's Defense Exhibit 42. This is already in evidence as well.

12 The last survey we looked at was active duty. What is
13 this survey summarizing?

14 A. This is the reserve component members.

15 Q. Could we take a look at page 3, which I think reports the
16 actual data. And I'm going to ask you about a few of these.
17 Let me know if it would be helpful to blow them up.

18 The first readiness indicator there is retention
19 intention. What does this say, for example, about how
20 experiencing discrimination can affect your intent to stay in
21 the military?

22 A. As you can see in the top line -- it is a little small,
23 but as you can see in the top line, those who experienced --
24 thank you.

25 "Those who experienced racial and ethnic harassment or

1 discrimination indicated a higher degree of unwillingness to
2 stay in the military."

3 Q. What about the next row, "Satisfaction with military of
4 life" -- sorry -- "with military way of life." What does the
5 survey results show about whether -- the effect of experiencing
6 discrimination has on how satisfied they are with the military
7 way of life?

8 A. Yes. Again, so those who experienced racial or ethnic
9 harassment/discrimination were far more dissatisfied with the
10 military way of life than those who did not experience
11 racial/ethnic harassment and discrimination.

12 Q. Just looking at the row "satisfied" there and comparing
13 the column of people who experienced discrimination versus
14 those who did not experience discrimination, what's the
15 magnitude of the drop there?

16 A. I'm sorry. Which --

17 Q. I might be able to --

18 A. Thank you. This is a very large shift between those who
19 experienced the racial and ethnic harassment/discrimination and
20 those who did not. It's a very large percentage shift.

21 Q. Have you done survey work yourself, Professor Lyall?

22 A. I have, yes.

23 Q. Do you find the findings of this survey significant?

24 A. I do. So I have conducted surveys on sensitive topics in
25 wartime environments, like Afghanistan; and these shifts that

1 we see here at 22 percent change between those who experienced
2 harassment and those who did not, this is a considerable
3 change.

4 Q. Would you say the same about the retention intention, the
5 59 percent versus 73 percent?

6 A. Yes. Again, this is a large shift.

7 Q. What about unit cohesion down here?

8 A. Again, this is a slightly different scale; so the
9 magnitude doesn't look as large, but it is, in fact, actually
10 quite a big shift as well.

11 Q. Thank you.

12 We can take this down.

13 Professor Lyall, when you were working on Project Mars and
14 your book "Divided Armies," did you calculate a military
15 inequality coefficient for the United States military today?

16 A. No, I did not.

17 Q. Could you, in theory, calculate a coefficient for the
18 military or Navy today?

19 A. In theory, yes. Hypothetically, it's possible.

20 Q. Hypothetically, if you were to do that, what could it be?

21 A. Yeah. So we would have to make several assumptions about
22 it. The only way to get into Project Mars is essentially to be
23 on the eve of a war, and so hopefully we're not in that
24 situation to actually calculate it.

25 We would have to make several assumptions about the fact

1 that the military going into that war would have the same
2 ethnic composition and racial composition as it does currently.
3 But for the purposes of a hypothetical we could assume that
4 it's about, say, 56 percent White, 44 percent non-White, for
5 example. And then we would need to assign the degree of
6 inclusion measure for each of the ethnic groups that make up
7 the current military.

8 Q. So as an example, what could it look like?

9 A. So one way to do this is we could draw actually on the OPA
10 survey, for example, that we just saw. And here we see
11 non-White soldiers, sailors, Marines reporting higher degrees
12 of discrimination than Whites and in some cases significantly
13 higher.

14 So one thing we could do is go back to the non-White
15 groups inside the military, and we could assign them a value of
16 a .5 which would represent exposure to discrimination, and we
17 would assign zero on the White population. And that would
18 generate, if you ran the numbers, if I'm doing my math right in
19 my head, about a .23 on the military inequality coefficient.

20 Q. So in that example, you assigned, I think, a value of zero
21 for the White component of the Army -- or military; you
22 assigned a .5 for the non-White. You referenced the workplace
23 surveys.

24 Is there any other data you could have looked to support a
25 finding of .5 for that minority group?

1 A. You can, yes. So, as we move into our modern time period,
2 we have more datasets available to us in political science, and
3 there is a leading data set called the ethnic Power Relations
4 dataset, or EPR, which is a consortium out of Europe that codes
5 access to executive political power for every ethnic group in
6 every state around the world since 1946. And they periodically
7 take snapshots of countries, including the United States, and
8 they assess the degree to which each ethnic group can access
9 the executive political power in a country.

10 And that is a narrow definition. They basically mean the
11 president, the cabinet, and maybe a few senior advisors in the
12 American context. The most recent version of that was 2021,
13 and we could take the values from that and then also try and
14 generate it.

15 If we did that according to the EPR data, it suggests that
16 every group in the United States that is an ethnic minority did
17 not exercise political power -- it was considered politically
18 powerless -- because of the nature of the cabinet when they
19 measured in 2021. And the White population is seen as
20 politically dominant.

21 And so it would roughly actually generate something
22 similar to using the survey data. It would be assigning a .5
23 value to all of the non-White groups within the military, and
24 the White, it would be back to a zero. And, again, if I'm
25 doing my math correctly, it would be about a .23 again.

1 So the survey data and EPR, very different kinds of data,
2 but are both kind of converging on similar outcome.

3 **MR. ROBINSON:** Can we pull up Lyall 3 again. This is
4 where it sort of lists the different bands.

5 **THE COURT:** This is again from Defendant's
6 Exhibit 195?

7 **MR. ROBINSON:** Yes. But I'm sorry. Lyall 4,
8 actually. But it's still from Defense Exhibit 195.

9 **BY MR. ROBINSON:**

10 **Q.** So with a military inequality coefficient of .23,
11 hypothetically, where would that put the United States on these
12 bands here?

13 **A.** It would put it in the very low end of the medium scale
14 here. It's right almost near the cut point between low and
15 medium.

16 **Q.** Thank you.

17 You can take this down.

18 If we can go back to Lyall 1. Again, this is a summary of
19 your opinions. What is the third opinion you're offering
20 today?

21 **A.** My third opinion is that military inequality has adverse
22 effects beyond the battlefield, beyond combat.

23 **Q.** What adverse effects can military inequality have beyond
24 combat?

25 **A.** So military inequality can effect outcomes not just on the

1 battlefield but on the war itself. So one of the relationships
2 we see in the data is that, as your military inequality
3 increases, the likelihood that you're actually going to win
4 that war decrease.

5 Q. How do you know that?

6 A. So, in an extension of Project Mars, we've been working
7 with new publications, and we've added data on whether or not
8 the combatants won the war or not, and then we've run similar
9 regressions.

10 Q. What are some of the other adverse effects that military
11 inequality can have beyond combat?

12 A. So there's a -- a very large, robust literature on the
13 relationship between ethnic inequality and coups.

14 So, for example, one of the leading predictors of coups in
15 sub-Saharan Africa is the degree to which your military has a
16 high degree of inequality. The greater the inequality -- this
17 literature calls this ethnic stacking, but the more stacked or
18 unequal your military, the greater your likelihood you're going
19 to have of a coup.

20 Q. Are you suggesting that there's a realistic chance of a
21 coup in the U.S. military today?

22 A. No.

23 Q. So why is this relevant?

24 A. Why is it relevant? So one of the things the U.S.
25 military does is essentially engage in training operations in

1 countries that are ethnically stacked, including recent
2 examples in Africa where we've had coups.

3 Part of what the military inequality coefficient is
4 telling you is not just how you're going to perform on the
5 battlefield but how your partners and allies might as well. So
6 this would be good to know if your ally was potentially
7 vulnerable to a coup and if the things that you were doing on
8 the ground in your training might actually be accidentally
9 exacerbating the risk of a coup.

10 **Q.** Are there any other adverse effects that military
11 inequality can have beyond combat besides the coup example?

12 **A.** So soldiers come home. And there's now a very interesting
13 emerging literature on what happens when soldiers who have
14 experienced discrimination or repression at the hands of their
15 state actually come home.

16 One recent study done by Roya Talibova tracking the return
17 of ethnic minorities out of the Russian army when it collapsed
18 in World War I, had an epic meltdown in 1917, and the soldier
19 went home. What did they do when they went home? Well, the
20 soldiers who had been exposed to discrimination by the czarist
21 government joined the Bolsheviks. They became the foot
22 soldiers for the Bolsheviks and helped push the civil war into
23 an incredible, intensive amount of violence.

24 In the American context, we've actually seen soldiers come
25 home, African American/Black soldiers come home after World

1 War I and World War II and become leaders in the civil rights
2 movement. So a more positive example of coming home, having
3 fought for the country, and then demanding the rights that they
4 fought for on the battlefield on the home.

5 Q. Now, I'd like to turn to your last opinion. If we could
6 go back to Lyall 1. Could you just read your fourth and final
7 opinion.

8 A. The final opinion is context analogous to modern combat
9 demonstrate that diversity inclusion can affect mission
10 performance.

11 Q. We have a demonstrative on this. This is Lyall 8 from
12 your report.

13 So you discuss three contexts that are analogous to modern
14 combat that we can draw from. Could you go through each of
15 these in order.

16 So, first, how is peacekeeping analogous to modern combat
17 and how is it relevant to this discussion?

18 A. So peacekeeping, particularly in the last 20 years or so,
19 has sort of evolved from our sort of stereotypes of blue
20 helmets walking in through safe areas, keeping sides apart, to
21 becoming much more kinetic, much more violent than it used to
22 be.

23 One of the things that the UN is doing in its peacekeeping
24 operations is trying to maximize diversity within its ranks on
25 the ground so that they can have better connections to the

1 local populations, they can help with the complex
2 decision-making because they are now at risk that approximates
3 some levels of violence.

4 So, for example, if you take the war in Afghanistan and
5 you look at the 20 years of that war and then you look at the
6 last 20 years of peacekeeping, more peacekeepers have died than
7 American soldiers loss in Afghanistan for most of those years
8 of the last 20 years of the war.

9 So the UN is trying to adapt to this sort of modern
10 conditions of peacekeeping, and part of that is through these
11 diversity kind of initiatives inside the ranks.

12 Q. You also mentioned in your report the example of policing.

13 How does the example of policing demonstrate that
14 diversity and inclusion can affect performance?

15 A. So policing is another area of active research where we're
16 investigating the effects of diversity on sort of
17 police-civilian interactions. It is now starting to be an
18 emerging finding that the more diverse your police force is,
19 the fewer the uses of lethal violence against the local
20 populations, the greater the ability to extract tips and
21 informations about criminal organization within those ranks.

22 We've seen this, for example, in studies in Chicago. But
23 interesting enough, we've actually seen now studies from the
24 international policing realm. There's a recent study in Iraq
25 where they randomized the sectarian composition of police

1 patrols. They had some that were Sunni, some that were Shia,
2 some that were mixed and then measured how the civilian
3 population engaged with these kinds of units in terms of how
4 much information did they get about criminal, how safe were the
5 areas, how safe did they believe the areas were. And they find
6 that the mixed teams actually performed the best in terms of
7 the civilian attitude toward safety and security.

8 Q. How about the third example you list here,
9 counterinsurgency operations? What does that teach us?

10 A. Counterinsurgency operations. Again, so this has been the
11 dominant form of U.S. exposure to war in Iraq and Afghanistan
12 for the last 20 years. Counterinsurgency operations sometimes
13 gets mischaracterized as being about hearts and minds and only
14 that.

15 Counterinsurgency operations are intensely kinetic,
16 intensely violent. Some of the most serious urban combat that
17 the Marines or the Army have experienced have been in the
18 context of Iraq and Afghanistan -- so Fallujah in 2004, for
19 example; Kandahar and Kandahar city in 2006.

20 Here, the argument is that diversity is important for,
21 again, getting information from local populations, being able
22 to access the sort of human capital of the areas that you're
23 working, to help you with problem-solving in these particular
24 areas in sort of very complex dynamics where you're trying to
25 work within a local population as well as root out insurgents.

1 So counterinsurgency operations have a mix of both sort of
2 modern war in them as well as the civilian component that is
3 often referred to as the graduate school of warfare in part
4 because of the complexity involved in these operations.

5 **Q.** So you've acknowledged that these examples are not modern
6 combat; they're analogous. So why do you think they're still
7 relevant to studying modern combat?

8 **A.** Exactly. They're analogous. Policing is not a direct
9 equivalent to modern war that we're seeing, for example, in
10 Russia and Ukraine or something like that. But they're still
11 the kinds of demands in terms of task complexity,
12 problem-solving. These are very challenging environments for
13 the soldiers and Marines who are engaged in them.

14 And so I do believe that both the kinetic levels is in
15 some cases close to what we see in modern warfare, but many of
16 the tasks and challenges that are faced in this particular
17 environment -- these environments are very similar to what we
18 would see in modern war as well.

19 **Q.** We've talked a lot today about modern armies and ground
20 combat. Do you believe that your opinions are also relevant to
21 the Navy and Marine Corps?

22 **A.** I do, yes.

23 **Q.** Why is that?

24 **A.** For two reasons. One, of course, we've spoken about the
25 Marines this morning. The Marines are, of course, engaged in

1 modern combat. They are part of the dataset of Project Mars
2 itself. And so I believe that would be directly relevant.

3 Again, more generally, the operations that we're going to
4 see the Navy engaging in are going to be, again, those that are
5 marked by high complexity, high degree of uncertainty and risk,
6 and complex problem-solving.

7 So I believe that the lessons that we learn about the
8 importance of diversity for armies would actually carry over in
9 terms of leadership, in terms of the importance of diverse
10 teams, the importance of teamwork, working in complex
11 environments.

12 **MR. ROBINSON:** Thank you, Professor Lyall. Nothing
13 further.

14 **THE COURT:** Thank you very much, Mr. Robinson.
15 Cross-examination, Mr. Strawbridge.

16 **MR. STRAWBRIDGE:** Just a moment, Your Honor. I need
17 to get a few materials to the witness.

18 **THE COURT:** Sure, take your time.

19 **CROSS EXAMINATION**

20 **BY MR. STRAWBRIDGE:**

21 **Q.** Good morning, Mr. Lyall.

22 **A.** Good morning.

23 **Q.** Good to see you again.

24 **A.** Good to see you as well.

25 **Q.** Just a couple of things to begin with.

1 You've never served in the military, right?

2 A. That is correct.

3 Q. And I think you said that you worked at Yale for nine
4 years, at the midpoint of your career, I suppose?

5 A. Yes. I'm not sure that's the midpoint yet. I'm hoping to
6 have a long career. But, yes, I've diverted there for nine
7 years.

8 Q. We're speaking optimistically that some day, it will be a
9 midpoint.

10 A. Thank you. I'll take that, yes.

11 Q. That's when you built the dataset that sort of forms your
12 core opinion about the military and equality coefficient in
13 this case, right?

14 A. Yes.

15 Q. That's also when you wrote your book, "Divided Armies"?

16 A. Yes. For the most part, yes.

17 Q. I think you testified on direct that that database was
18 basically coded up by a bunch of undergraduate and graduate
19 students at Yale?

20 A. It was coded up by undergraduates and graduate students,
21 yes.

22 Q. Over the course of seven years?

23 A. About seven years, yes.

24 Q. Do you know how many undergraduate versus graduate
25 students?

1 A. There were 134 coders in total. They were actually all
2 named in the introduction -- or the acknowledges of the book.
3 I'm not sure of the exact breakdown of PhD students, but I
4 would imagine it's somewhere in the neighborhood of 20,
5 perhaps.

6 Q. Okay. And you also actually wrote and completed writing
7 the book during your time at Yale as well, right?

8 A. Yes.

9 Q. Before you moved to Dartmouth?

10 A. Yes.

11 Q. You would agree with me that nothing in your work
12 addresses racial preferences in college admissions?

13 A. I would agree with that, yes.

14 Q. You've actually never been to the Naval Academy?

15 A. That's true as well, yes.

16 Q. You did not interview anyone from the Naval Academy before
17 filing your report?

18 A. I did not interview anyone.

19 Q. You know nothing about Naval Academy admissions?

20 A. No.

21 Q. And nothing in your work says anything about what would
22 happen if the Naval Academy stopped using race as one factor in
23 its admissions process, correct?

24 A. That's correct.

25 Q. And I think you told Mr. Robinson, but just so we're

1 clear, you agree that the prospect of Vietnam-era race riots in
2 today's military is remote, correct?

3 **THE COURT:** I'm sorry. What was your question again?
4 I'm sorry.

5 **MR. STRAWBRIDGE:** That the prospect of Vietnam-era
6 race riots in today's military is remote, the prospect of that.

7 **THE WITNESS:** I agree, yes.

8 **BY MR. STRAWBRIDGE:**

9 **Q.** Your area of specialty is military affairs and political
10 science?

11 **A.** Yes. Broadly speaking, yes.

12 **Q.** Not employment?

13 **A.** That's correct, yes.

14 **Q.** Not economic analysis?

15 **A.** No.

16 **Q.** Let's see if we can start with just a point of maybe
17 limited common agreement.

18 You would agree with me that the use of race in admitting
19 officers to the military through the Naval Academy can have
20 potential negative effects, correct?

21 **A.** Potentially.

22 **Q.** For example, if the use of race led to a belief that the
23 less qualified applicants had been put ahead of more qualified
24 applicants, that could cause some friction?

25 **A.** Yes, possibly.

1 Q. And you do not disagree that if the use of race resulted
2 in less qualified individuals obtaining advancement or
3 promotion as officers in the military, that could also have a
4 negative effect?

5 A. Yes, possibly.

6 Q. And, indeed, the research that you relied on for your
7 opinion in this case, it self-confirms that the use of
8 affirmative action can have negative effects on military
9 operations, right?

10 A. Which research are you referring to?

11 Q. Well, let's just -- I'm going to pull up your report,
12 which I think is somewhat consistent with your testimony today.

13 Mr. Pusterla, can we see Defendants' Exhibit 195, page 8.

14 On page 8 you cite a number of studies about the benefits
15 of diversity, correct?

16 A. I do, yes.

17 Q. This is the paragraph that has your diversity bonus,
18 correct?

19 A. I believe so. Mine is zoomed up to --

20 Q. You can page down a little bit.

21 A. Oh, I see. Yes, I see the diversity bonus.

22 Q. Right. And you would agree with me that, for the most
23 part, the studies that you cite below for this paragraph of
24 diversity bonus, for the most part, none of those studies have
25 anything to do with the military context, correct?

1 A. That is correct, yes.

2 Q. There's a couple studies about -- I think by Rosen which
3 are studies of the historical treatment of castes in the Indian
4 army, correct?

5 A. Yes. So the Rosen 1996 and Rosen 1995 are about Indian
6 caste systems. And the '96 is actually a little bit broader
7 than that. But yes, they refer to caste.

8 Weiss is about -- has racial elements in it too, yes.

9 Q. I mean, Mr. Weiss is a Marine who wrote a book about how
10 you should recruit Gen Z individuals, correct?

11 A. He did, yes.

12 Q. It doesn't have any statistical analysis in it, does it?

13 A. Oh, I see. Statistical analysis? No, it does not.

14 Q. And the other military paper that you cite here involves
15 the South African army. I believe that's correct?

16 A. Yes.

17 Q. And that's a paper you relied on in this report, right?

18 A. I'm sorry?

19 Q. That's a paper that you relied on in forming your
20 opinions?

21 A. Yes.

22 Q. And I'd like to bring that article up. That article is
23 "Managing Diversity: From Exclusion to Inclusion in Valuing
24 Difference."

25 Is that the article?

1 A. Yes.

2 Q. By Linday Heinecken and Joseph Soeters; is that correct?

3 A. Yes.

4 Q. All right. So that's Plaintiff's Exhibit 873.

5 If we can pull that up.

6 This is the article, correct?

7 A. Yes.

8 Q. I want to go to page 3 of this article where there's a
9 background section.

10 And in the first section of the background, it describes
11 how the South African military in 1993 was essentially a White
12 male conscript force where Blacks were permitted to serve in
13 the military in separate ethnic battalions on a volunteer basis
14 but were not conscripted, right?

15 A. Uh-huh.

16 Q. And then the next paragraph down notes that there was a
17 change following the first democratic elections in South Africa
18 in 1994, right?

19 A. Yes.

20 Q. And then on the next page it talks about the fact that the
21 integration of predominantly African forces together with the
22 legal and politically driven affirmative action and equal
23 opportunity programs were to change the racial and gender
24 profile of the South African National Defense Force
25 significantly, right?

1 A. Yes.

2 Q. And then on the next page, the paper notes that "Racial
3 tensions have persisted due to the manner in which affirmative
4 action for Blacks and women have been implemented," right?

5 A. Yes.

6 Q. And then that's what the next section of this paper
7 describes in detail, right?

8 A. Yes.

9 Q. It describes that "Affirmative action embodies a form of
10 discrimination by advancing certain groups -- in this case,
11 Blacks and women. This often leads to resentment and tension,
12 especially where the focus is on getting the numbers right,
13 irrespective of any consequences they may hold."

14 Correct?

15 Do you see that?

16 A. I actually did not see that, but I believe you're reading
17 it.

18 Q. I mean, do you remember that when you were reading the
19 report?

20 A. Yes.

21 Q. I think this is on page 4.

22 Are we on page 4 of the document, Mr. Pusterla?

23 There's also a reference to "an atrophy of experienced
24 White skilled military personnel. And those that remain have
25 come to feel increasingly disempowered, undervalued, socially

1 isolated and alienated. In conversations with White officers,
2 many state that they feel they are no longer wanted or valued."

3 Do you see that?

4 A. Is that on that page?

5 Q. I believe it is on the page. I apologize. I cannot
6 actually see the screen from where I am.

7 Do you remember reading that when you read this report?

8 A. I mean, yes. I just --

9 Q. Okay. All right. You didn't mention any of that in the
10 expert report that you filed in this case, did you?

11 A. On the South African case? No.

12 Q. I mean, you cited the study, but you just didn't bring out
13 any talk of these negative effects, right?

14 A. No.

15 Q. Okay. This study also talks about the importance of
16 foreign operations and language skills.

17 Do you remember that part of the discussion?

18 A. I believe so, yes.

19 Q. All right.

20 We can take the exhibit down.

21 That's consistent with your own experience in Afghanistan,
22 right?

23 A. Which part?

24 Q. That language was an important aspect of the Afghan army's
25 ability to work with the local populations on the ground.

1 A. Yes. It's one component that helped them access the local
2 population, yes.

3 Q. It's what allowed the individuals in the Afghan army to
4 interact with local populations in the way that United States
5 soldiers could not?

6 A. Yes.

7 Q. And you agree that language skills are not inherent in
8 anybody's race?

9 A. That's true, yes.

10 Q. You cannot assume anybody speaks any language just by
11 their skin color?

12 A. Of course.

13 Q. And you don't believe, just for example, that there's any
14 basis to assume that an African American from the United States
15 is necessarily going to have better interactions with somebody
16 from an African country merely because of the color of their
17 skin, correct?

18 A. That's true.

19 Q. Okay. Back to page-- back to your report, which is
20 Defendants' Exhibit 195, and the paragraph that you were
21 talking about with respect to the studies, which I believe is
22 on page 8 of this document.

23 You should have a paper copy there.

24 A. Yeah, I've got it. Thank you.

25 Q. You agree with me that the gold standard for empirical

1 research is a randomized controlled experiment?

2 A. Yes, when possible.

3 Q. One that produces statistically significant conclusions?

4 A. A randomized controlled trial is not the only methodology
5 for establishing a statistically significant conclusion. A
6 randomized controlled trial is our preferred method when
7 ethical and logistically feasible to do so.

8 Q. Right. You're not aware of any such studies that reveal
9 the effect of racial diversity in the officer corps on the
10 lethality of military units, correct?

11 A. With a randomized controlled trial?

12 Q. Yes.

13 A. No. That would likely be unethical and/or logistically
14 impossible.

15 Q. And you agreed with me, I think earlier, that, other than
16 the studies we've discussed, the studies that you've cited in
17 this paragraph on the diversity bonus all come from a civilian
18 context, correct?

19 A. You're referring here to the paragraph that's citing these
20 particular citations, 10 through 18?

21 Q. That's correct.

22 A. So these are not all from the civilian context. So, for
23 example, Fennell and Grasmeder are both in the military
24 context. For example, the Rosen is in the military context.
25 Again, the Weiss is in the military context. I'm not sure if

1 that's what you're asking, but --

2 Q. Which of those are empirical studies that present
3 statistical results?

4 A. Wow. So I would disagree that empirical means only
5 statistical because if you imagine a historian sitting here,
6 they don't use statistics. And I think they would value their
7 work as being empirical. And so the Rosen, for example, is one
8 of the most seminal studies in the study of military
9 effectiveness, and there's no statistics in that. That's --

10 Q. That's the study of sort of 18th century Indian castes?

11 A. Not just 18th century Indian castes, of course. It's a
12 cross-national -- or across-time study of India. Yes, that's
13 one of the most seminal studies of military effectiveness. And
14 so I would hate to cast the literature as saying if you only
15 use stats, that's the only thing we're going to include because
16 my historian friends would be very upset.

17 Q. Your study does cite an actual U.S. military study, I
18 believe, about improving recruitment and retention among
19 minority groups; is that correct?

20 Not in this paragraph --

21 A. Oh, not in this paragraph, just in the report in general?

22 Q. In the report in general.

23 A. I believe so.

24 Q. And that's on page 24 of your report?

25 And there's a paragraph that refers to evidence from the

1 U.S. Navy itself.

2 A. This is page 24?

3 Q. I'm sorry. It should be page 24 of the PDF.

4 A. I'm sorry. It's on page 22 now on the screen and --

5 Q. Okay.

6 MR. STRAWBRIDGE: Your Honor, I'm just going to move
7 to the podium so I can actually see the screen.

8 THE COURT: Sure. That's fine. That's fine.

9 THE CLERK: Remember to turn off your mic.

10 BY MR. STRAWBRIDGE:

11 Q. All right. Looking at the paragraph at the bottom of this
12 page, do you see that, Mr. Lyall?

13 THE COURT: Just for the record, we're on page 24,
14 which is -- ECF is Defendants' Exhibit 195-026, I believe.

15 MR. STRAWBRIDGE: That is correct, Your Honor.

16 THE COURT: Fine.

17 BY MR. STRAWBRIDGE:

18 Q. Do you see this paragraph?

19 A. Yeah. I'm sorry.

20 This is page 22, just to be correct, yes.

21 Q. Okay.

22 A. Yeah.

23 Q. I think the difference is probably between what the PDF --

24 THE COURT: I'm looking at page 24, 026. I'm looking
25 at your page 24. What are you looking at?

1 **THE WITNESS:** I was at 24 too, I believe, sir, but I
2 believe he's on page 22.

3 **MR. STRAWBRIDGE:** It's page 22.

4 **THE COURT:** Okay. All right. Thank you.

5 **BY MR. STRAWBRIDGE:**

6 **Q.** Do you see the reference to the evidence from the U.S.
7 Navy itself there?

8 **A.** Yes. I see this.

9 **Q.** And in this case, what you are citing is this study by
10 Rodriguez and Serna in Footnote 75, correct?

11 **A.** Yes.

12 **Q.** That's a study from the Naval Postgraduate School?

13 **A.** Yes.

14 **Q.** I believe this is the only study from the Naval
15 Postgraduate School that you cited in your report in this case?

16 **A.** That is correct, yes.

17 **Q.** You didn't cite P800, which we saw yesterday?

18 **A.** I'm sorry. Is that the study on the DDGs?

19 **Q.** Yes.

20 **A.** Yes, I did not cite that and did not see that.

21 **Q.** Okay.

22 I want to see how you report the results of Rodriguez and
23 Serna.

24 You write that "Results from a recent statistical analysis
25 indicate that an increase in coethnic peers, immediate

1 supervisors, and senior leadership on medium ships such as
2 destroyers, along with submarines, increases retention among
3 Black first-time sailors and first-time Hispanic officers.

4 "In addition, an increase in same-minority senior
5 leadership increases retention of first-term non-Hispanic and
6 Black officers."

7 Correct?

8 A. Yes.

9 Q. That's what you cited for your opinion, that having more
10 leaders and peers from minority groups affects
11 minority/nonminority enlisted in officer retention, correct?

12 A. Yes. And I believe these terms are from the study.

13 Q. All right. Did you report the size of the increased
14 retention when you -- when you wrote your report?

15 A. I did not, no.

16 Q. Let's actually take a look at the study itself.

17 And if we can keep that on a split screen, Mr. Pusterla.

18 This is going to be marked as Plaintiff's Exhibit 872.

19 **THE COURT:** Plaintiff's Exhibit 872 will come into
20 evidence. Thank you.

21 **BY MR. STRAWBRIDGE:**

22 Q. Is this the study that you're referring to?

23 A. Yes.

24 Q. Let's go to the conclusions page.

25 The first conclusion is about enlisted retention in medium

1 ships and submarines, right?

2 A. Yes.

3 Q. And when this report refers to the increase in
4 same-minority peers, immediate supervisors, and senior
5 leadership on board these ships with respect to enlisted
6 retention, is it referring to officers or enlisted when it
7 talks about the senior leadership?

8 A. Could you ask that question again.

9 Q. Yes.

10 There's a reference here to an increase in peers,
11 immediate supervisors, and senior leadership on board these
12 ships, correct?

13 A. Yes.

14 Q. And this section of the report is about enlisted
15 retention, right?

16 A. Yes.

17 Q. My question is, when they say senior leadership, are they
18 talking about enlisted leaders or officers?

19 A. I'm not sure.

20 Q. You don't remember?

21 Well, we can go up a little bit.

22 If you go to page 61, Mr. Pusterla.

23 This is a discussion of enlisted Black retention, which is
24 one of the things that you expressed in your report, correct?

25 A. Yes.

1 Q. And do you see in the end of the second paragraph, "Sailor
2 reenlists given their exposure to black peers, black immediate
3 supervisors (E5 and E6), and black senior enlisted leadership
4 (E7 through E9)," correct?

5 A. Yes.

6 Q. So this part of the report is actually about enlisted
7 leadership, right?

8 A. Yes. It appears, I think.

9 Q. And you understand that this case is not about enlisted
10 leadership, right?

11 A. I'm not a naval -- you've established I'm not an expert on
12 naval admissions; so...

13 Q. All right. Well, let's go back to the conclusions back on
14 page 60 of the report.

15 Mr. Pusterla, I think, has that up.

16 This notes -- the conclusion that you reported on the left
17 in your report about sailor retention, this says that "the
18 likelihood of retention for enlisted sailors increased by 2.1,
19 1.4, and 1.3 percentage points, respectively," right?

20 A. Yes, that's what the report says.

21 Q. Those are relatively small differences in retention rates.
22 Would you agree?

23 A. That depends, actually. It depends what the base rate is.

24 Q. You think that those are large differences? You put this
25 study in your report. I'm asking if you think they're large or

1 small differences.

2 A. Yes. So, actually, I would think that these could be
3 fairly significant in terms of size, not just in terms of
4 statistical significance.

5 Q. Okay. We'll come back to that.

6 Further down on the page, it refers to the same
7 10 percentage point increase in diversity among peers,
8 immediate supervisors, or senior leadership for Hispanics had
9 no statistically significant effect on reenlistment decisions
10 of Naval enlisted personnel aboard medium-size ships and
11 submarines, right?

12 A. Yes.

13 Q. Now, you didn't report any of that in your report or
14 today's testimony, correct?

15 A. That's correct.

16 Q. Now let's talk about large ships and enlisted retention.
17 That's on the next page.

18 This time the effect of increasing same minority, senior
19 leadership in the enlisted ranks increases Black sailor
20 retention by .3 percentage points; is that right?

21 Second sentence.

22 A. Second sentence, middle paragraph. You're moving the
23 cursor. Okay.

24 Yes, I see that.

25 Q. Right. That's an even smaller difference. We can agree?

1 A. That would be smaller, yes.

2 Q. But it decreased Hispanic retention -- and this is in the
3 last paragraph -- by .5 percentage points, right?

4 The last sentence of that paragraph.

5 A. Yes. I see it.

6 Q. And you didn't report that in your study, did you?

7 A. That's true.

8 Q. Now let's talk about officer retention. You can see it at
9 the bottom of this page, right?

10 I just want to go back to your screen on the left where
11 you reported an increase in same-minority senior leadership
12 increases retention of first-time non-Hispanic and Black
13 officers, right? That's what you said in your report?

14 A. Yes.

15 Q. I want you to look at the second sentence of -- under
16 officer retention.

17 "Moreover, our results suggest that a 10 percentage point
18 increase in Black senior leadership had a negative impact on
19 junior Black officer retention, reducing it by 2.8 percentage
20 points, compared to junior non-Black officer retention."

21 Is that right?

22 A. That's what the report says, yes.

23 Q. That's what it says?

24 A. That's what it says.

25 Q. So you reported that it increased Black officers; the

1 report says it decreased Black officers, right?

2 A. Yes. I needed to be more accurate in which type of
3 officers.

4 Q. And you were agreeing earlier that those changes at 1.2 or
5 1.3 percent retention could be significant. 3 percent is
6 obviously much larger, correct?

7 A. Yes. Depending on the base rate, yes.

8 Q. And then, just to be fair to you, if we go down, the same
9 increase in Hispanic leadership did not have a statistically
10 significant impact -- we can turn the page -- on junior officer
11 retention, but it increased non-Hispanic officer retention by
12 .8 percentage points, correct?

13 A. Yes.

14 Q. And then an increase in same-minority peers increased
15 Hispanic officer retention by 4 percentage points. Those are
16 peers, not leadership, right?

17 A. Yes.

18 Q. All right. Now I want to ask you a little bit about your
19 peacekeeping opinions.

20 Do you remember giving some opinions about the
21 peacekeeping as a comparable area to study to the military's
22 needs?

23 A. Yes, sir, I remember.

24 Q. If we go to -- it's page 25 of the PDF. I'll tell you
25 what page of the document is of the report.

1 We can take the PGS report down.

2 So we're back on -- we're back on Defendants' Exhibit 195.
3 If we go to page -- okay -- my page 25 of the document.

4 All right. This is your opinion about context analogous
5 to modern combat.

6 A. I'm sorry. Just to be clear, we're on page 23, not 25?

7 Q. Correct. It's 25 of the document that we have because
8 there's some cover pages, but it's 23 of this.

9 A. I see.

10 Q. And then you have some reference to some peacekeeping
11 studies in the second paragraph?

12 A. Yes.

13 Q. All right. I want to ask you a little bit about these.

14 You give an example that in Mali, for example, "Contact
15 with diverse peacekeeping units led to improved perceptions of
16 government legitimacy and a higher willingness to cooperate
17 with other ethnic groups relative to those citizens who never
18 encountered a UN patrol or who only met French peacekeeping
19 detachments."

20 That's what you said, right?

21 A. Yes.

22 Q. And when you talk about the diversity here, the diverse
23 peacekeeping units, are you talking about racial or ethnic
24 diversity?

25 A. Racial or ethnic diversity or both or --

1 Q. Yeah. I want to know whether this study, in your view,
2 supports a finding about racial and ethnic diversity.

3 A. I do believe it supports that, yes.

4 Q. In this paragraph you cite Nomikos 2022 and Nomikos 2023,
5 correct?

6 A. Yes.

7 Q. Now, you know Mr. Nomikos?

8 A. I do, actually.

9 Q. Am I pronouncing his name correctly?

10 A. I believe that's correct, yes.

11 Q. Okay. I'd like to bring up Plaintiff's Exhibit 874.

12 This is one of the Nomikos articles that you cited; is
13 that correct?

14 A. Yes.

15 Q. All right. Do you see the abstract at the top of the
16 page?

17 A. Yes.

18 Q. Actually, let's start in the second sentence of the
19 abstract.

20 "The article demonstrates that the presence of
21 peacekeepers makes individuals more optimistic about the risks
22 of engagement and the likelihood that members of out-groups
23 will reciprocate cooperation." He talks about how he uses data
24 from Mali to show that "UN peacekeepers increased the
25 willingness of individuals to cooperate relative to control in

1 French enforcers." Correct?

2 A. Yes, that's correct.

3 Q. "I find that UN peacekeepers are especially effective
4 among those participants who hold other groups and institutions
5 in low esteem as well as those who have more frequent contact
6 with peacekeepers. Follow-up interviews and surveys suggest
7 that perceptions of the UN as unbiased rather than other
8 mechanisms account for its effectiveness." Right?

9 A. Yes.

10 Q. So he found that it was the lack of bias in the UN
11 peacekeepers, not their ethnic and racial identity, that
12 accounted for the effectiveness, right?

13 A. No. Their unbiased nature is due in part to the ethnic
14 composition of those peacekeepers relative to the French
15 peacekeeping forces which are also operating in this area. So
16 it is an explicit comparison between the UN forces and those of
17 the French.

18 Q. Let's go to page 10 of this document, if we can. We'll
19 see if that's true.

20 If you look at the bottom of page 10. He says, "I find
21 evidence that" -- in the middle of the paragraph.

22 "I find evidence that perceptions of the UN as unbiased
23 and France as biased account for the relatively greater
24 effectiveness of UN peacekeeping. Moreover, I show in
25 Appendix A that there is little evidence in favor of other

1 potential mechanisms."

2 Did you look at Appendix A when you were looking at this
3 report?

4 A. Yes.

5 Q. So let's go to Appendix A. That's 874.1. I'm sorry.
6 874. Oh, I'm sorry. 867. Plaintiff's Exhibit 867. This is
7 the online appendix?

8 A. Yes.

9 Q. You can see at the top, supplemental material,
10 "Peacekeeping and the Enforcement of Intergroup Cooperation
11 Evidence for Mali"?

12 A. Yes.

13 Q. I want to go to page 5 of this appendix. "UN Force
14 Compensation and Bias Against Tuareg."

15 Do you see this?

16 A. Yes.

17 Q. Here, Mr. Nomikos delves deeper into the alternative
18 explanation that the effect of the main study of this paper is
19 driven by perceived by UN peace builders' bias against Tuareg
20 or in favor of other non-Tuareg ethnic groups. "I approach
21 this explanation by looking specifically at the force
22 composition of UN peacekeepers in Mali."

23 Is that what he writes?

24 A. Yes.

25 Q. Then he goes on to describe the fact the UN peacekeepers

1 in Mali are from 41 different nationalities, correct?

2 A. Yes.

3 Q. He notes that Bangladesh, Sweden, and Netherlands were
4 included in the three peacekeeping groups, correct?

5 A. Yes, that's correct.

6 Q. Then he also talks about there were some contributors from
7 other sub-Saharan African states -- Burkina Faso, Chad, Ghana,
8 Guinea, Niger, Senegal, and Togo, right?

9 A. Uh-huh.

10 Q. And he said some of those states have similar identity
11 cleavages to Mali that may lead individuals to believe that UN
12 peacekeepers were actually biased in their favor, right?

13 So he's talking about their ethnic cleavages here. You
14 would agree with me, right?

15 A. Yes, potentially.

16 Q. So if you go to the next page, he talks about the
17 follow-up survey that he did, where he asked respondents from
18 which part of the world they thought the most peacekeepers
19 came.

20 The most common answer was Europe. Do you see that?

21 A. I do.

22 Q. 25 percent said West African, the region that contains
23 Mali as well as Burkina Faso and Niger, and 26 percent said
24 sub-Saharan Africa.

25 He then went on to ask which country they thought most of

1 the UN peacekeepers were from. Less than 10 percent answered
2 Burkina Faso, and no one said Niger. The most common answer
3 was Chad.

4 Then he goes on to say, "A generous interpretation of
5 these findings is about half of all respondents believe that
6 peacekeepers came from a state with similar identity cleavages.
7 Since Malians do not overwhelmingly believe the UN peacekeepers
8 came from states with similar identity cleavages, it seems
9 unlikely that respondents in the study's lab experiment would
10 condition their donations" -- that was the experiment that was
11 run here, right?

12 A. That's correct, yes.

13 Q. The willingness to donate money to a particular group?

14 A. That's correct. We use that as a behavioral measure of
15 trust.

16 Q. Right.

17 -- "would condition their donations on the perceived low
18 likelihood that UN peacekeepers would be biased in their favor.
19 If there are two peacekeepers enforcing their behavior, they'd
20 likely only believe one of them would be from a place with
21 similar ethnic cleavage."

22 Correct?

23 A. Yes, although mine's cut off there, actually.

24 Q. Yours is cut off?

25 A. Yes. Is yours showing? What you just read, the sentence,

1 mine's gone, half of it. My literally says, "Then it is likely
2 that they believe that only one of them would be" -- then it
3 stops.

4 Q. Fair enough.

5 A. I just want to make sure.

6 Q. Fair enough. Let's go on to the next paragraph where we
7 talk about --

8 "Nonetheless, even if we were to assume the respondents
9 did believe the UN peacekeepers in the experiment were from
10 states with similar identity cleavages, if this mechanism were
11 to account for the positive UN effect, we should also expect
12 Malians to hold favorable opinions of West African
13 peacekeepers.

14 "Observational evidence suggests this is not the case with
15 UN presence in Mali. Most of the West African peacekeepers in
16 Mali are remnants from the African-led international support
17 mission to Mali. The rehatting of those troops to peacekeepers
18 has been complicated with states failing to meet UN
19 peacekeeping norms."

20 It goes on to describe some issues they had had with
21 sexual exploitation and assault of Malian women, correct?

22 A. Yes.

23 Q. "This evidence suggests that the African peacekeepers,
24 rather than being perceived positively, would be perceived
25 negatively by the population." Correct?

1 A. Yes.

2 Q. If you go to the next page.

3 "If there does exist bias because Malians perceive
4 peacekeepers in Mali as not being neutral but from a
5 neighboring state, then the direction of that bias would be
6 negative. Put simply, if Malians associate peacekeepers with a
7 state that shares a similar identity cleavage, then the
8 association would likely bias the estimate of any UN
9 enforcement effect downwards and against my findings."

10 That's what he wrote, right?

11 A. Absolutely, yes.

12 Q. You didn't explain any of this in your testimony?

13 A. I did not work through the mechanics of the
14 lab-in-the-field experiment of Mali. No, I did not.

15 Q. You understand that one of the Government's arguments in
16 this case is that the Navy needs to use race at the Academy so
17 the officer corps can be more effective at missions abroad?

18 A. Yes.

19 Q. If we go back to your report, the page that we were
20 previously looking at, you also cite some papers from Bove in
21 this paragraph about the UN information?

22 A. Yes.

23 Q. Do any of the Bove sources specifically focus on racial or
24 ethnic diversity?

25 A. In the context of UN?

1 Q. Yes, in the papers you're citing here.

2 A. I don't believe so.

3 Q. Isn't it true that they measure diversity as linguistic,
4 geographical, and religious?

5 A. Yes.

6 Q. I want to talk a little bit about your equation, the
7 military inequality coefficient.

8 You would agree with me, Professor Lyall, that your work
9 does not support any finding that ethnic or racial diversity in
10 the military in and of itself improves battlefield performance?

11 A. Could you restate the question. Or ask the question
12 again. I'm sorry.

13 Q. Yes. You agree that ethnic and racial diversity in the
14 military alone, your work does not support the view that that
15 is what improves battlefield --

16 A. Just by itself, no.

17 Q. Right. Indeed, as you say I think in your book, the
18 central driver of battlefield performance is military
19 inequality, not ethnic diversity, right?

20 A. Yes.

21 Q. What matters is how a nation treats the members of the
22 army in terms of access to the basic rights of citizenship and
23 participation in society?

24 A. Yes, the treatment is important. Although, of course, the
25 demographics are also important because, if you're treating a

1 very large portion of your military poorly, then, of course
2 that will magnify the effects of inequality.

3 Q. Right. But it's the treatment that really makes the
4 difference?

5 A. Treatment is important, yes.

6 Q. So an army composed of many different ethnicities, none of
7 which are subject to state-sponsored discrimination or
8 repression, will be considered by your equation to have very
9 low inequality?

10 A. Yes, that's true.

11 Q. And a nation that represses all ethnic groups but also
12 excludes them from the military will also register very low on
13 the inequality scale?

14 A. Yes. It's a measure of the military itself; so if those
15 excluded groups are not and never come into military service,
16 then they would not appear in the data.

17 Q. So we can talk specifically about an example, I think one
18 you brought up, which is the American Civil War. Right?

19 A. Yes.

20 Q. You would agree with me that the military inequality
21 coefficient for the Confederate States of America was lower
22 than the military inequality coefficient for the union?

23 A. Yes, I believe that's true, actually.

24 Q. And the reason that is is because -- it's not because
25 Jefferson Davis's republic had any enlightened view of

1 diversity and inclusion?

2 A. I think that's safe to say, yes.

3 Q. It just has to do with who they allowed to fight in their
4 Army?

5 A. Yes. The exclusion of the Black population would -- they
6 would not be counted inside their ranks.

7 Q. The Confederates did not have any Black soldiers in their
8 army?

9 A. None, yes.

10 Q. But the Union army did?

11 A. It did, yes.

12 Q. So because Lincoln and Winfield Scott allowed soldiers
13 into the Union army that lacked full rights to participate in
14 society, it raised their inequality coefficient, correct?

15 A. So we have to be a little bit careful here on how the
16 index is constructed. It is looking only at the army on the
17 eve of war; it is not a cross-time analysis.

18 So the Union forces, for example, to take your example,
19 would be changing in composition for each of the years of the
20 war. This is going to just take that snapshot on the prior --
21 the eve of the war; so the Black population would become an
22 increasingly large share of the military over time, but it
23 would be a small portion at the outset of the war.

24 Q. Just so that we're all clear, Project Mars, your data
25 measures it on the eve of the war?

1 A. Yes.

2 Q. So any changes that were made over the course of the war
3 is not capture at all in your dataset?

4 A. That's right. It is not a time series dataset; it's a
5 single shot of each country.

6 Q. You would agree with me that you ranked the Confederate
7 army in the lowest inequality band of the four bands you track?

8 A. I don't remember the exact point estimate, but it would be
9 lower than the Union forces, yes.

10 Q. I can refresh your recollection with the information from
11 the sheet if you'd like.

12 Can pull up the Project Mars sheet.

13 This is your database?

14 A. I believe so, yes.

15 Q. If we go to line 247, I believe. We've got the Civil
16 War -- the Confederates on top, the Union army below?

17 A. Yes, I see it.

18 Q. And Column U, I think, has the mean military inequality
19 coefficient. Is that correct? I'm sorry. Column U has the
20 band, correct?

21 A. The band.

22 Q. So page back down.

23 The Confederate army on top is in Band 0, correct?

24 A. Yes.

25 Q. That's the lowest level of inequality?

1 A. Yes.

2 Q. And the Union army is in Band 1, correct?

3 A. Yes.

4 Q. That's somewhat higher?

5 A. Yes.

6 Q. Your dataset also includes World War II, correct?

7 A. It does, yes.

8 Q. And it includes the Allied forces against Germany in the
9 European theater as one of the measures?

10 A. It does, yes.

11 Q. It includes Operation Overlord, right?

12 A. Yes. That is considered a separate campaign in the
13 dataset, yes.

14 Q. Operation Overlord encompasses D-Day --

15 THE COURT: I'm aware of that.

16 MR. STRAWBRIDGE: Just for the record, Your Honor.

17 THE COURT: That's all right.

18 MR. STRAWBRIDGE: I know you know.

19 BY MR. STRAWBRIDGE:

20 Q. That's right. Operation Overlord is the D-Day?

21 A. Is D-Day, yes.

22 Q. Germany is listed, I believe, in line 661, correct?

23 A. Yes.

24 Q. And if we go across, I believe you list eight groups as
25 being Column X, eight groups in the German military. Is that

1 right?

2 A. I believe column -- yes, if Column X is the number of
3 groups, yes.

4 Q. We can page back down to Germany. All right.

5 And do you remember what those eight groups are?

6 A. Not off the top of my head. I'd have to refresh. But
7 this part of the war, in Overlord, the Germans would have had
8 populations from a variety parts of Europe manning the
9 defenses.

10 Q. If I told you it was Germans, Russians, French, and five
11 groups from far eastern Europe or the Caucasus, does that jog
12 your memory?

13 A. Yes, it sounds familiar.

14 Q. And the United States, which I believe is a couple of rows
15 down, is listed as having four ethnic groups?

16 A. Yes. I see it.

17 Q. Do you know what the four ethnic groups are?

18 A. Certainly would be White, probably Black, probably
19 Latino/Hispanic. I'm not sure what the fourth would be.

20 Q. Do you know why Whites would only be listed as one group
21 as opposed to Irish and Italian and other subgroups?

22 A. Yeah. So it's a great question.

23 So, over time, identities change. And so the Union
24 forces, for example, the rosters and the soldiers identified as
25 Irish, for example.

1 Over time -- and there's actually a wonderful sociological
2 study of how the Irish became White. You see these transitions
3 across time.

4 So we are taking the categories basically from the time
5 periods. And so in this category, White would be considered an
6 identity group.

7 Q. You would agree with me that there can be various
8 subethnic identities within White Americans?

9 A. Yes, it's possible.

10 Q. Especially in World War II, Italian Americans were
11 probably a fairly identifiable ethnic subgroup?

12 A. Possibly, yes.

13 Q. That's also true for Hispanic or Latinos, correct?

14 A. Yes.

15 Q. Puerto Ricans are very different than, say, Mexican
16 Americans?

17 A. I would say yes.

18 Q. There are many subgroups of Asian Americans, correct?

19 A. Yes.

20 Q. Koreans versus Chinese versus Japanese Americans?

21 A. Yes.

22 Q. But for purposes of your analysis, in the United States,
23 at least, they're all lumped in together, correct?

24 A. Yes.

25 Q. Back to our exercise here. I want to talk about the level

1 of inequality in the German army and the United States army.

2 The German army has a .15 average military inequality
3 coefficient; is that correct?

4 A. Yes.

5 Q. And that puts it in the lowest band of your -- of your --

6 A. Yes.

7 Q. And, again, that's not because Germany was known for its
8 approach to quality among its citizenry, right?

9 A. That's true, yes.

10 Q. It was engaged in one of the most horrific genocides this
11 planet has ever seen at this time?

12 A. Yes.

13 Q. But it didn't allow any of those people into its military;
14 so it scored relatively low, which is to say well, on the
15 military inequality coefficient.

16 A. Right, that's right. It's on the low band, yes.

17 Q. And the United States actually scores a little bit better
18 than Nazi Germany, right?

19 A. Yes.

20 Q. But in the same band?

21 A. Yes.

22 Q. I want to zoom out a little bit.

23 Your Project Mars database is limited to conventional
24 ground wars, correct?

25 A. Yes.

1 Q. It does not include counterinsurgency campaigns?

2 A. It does not. I have a publication on that but not for
3 Project Mars.

4 Q. So none of the United States's military actions in
5 Afghanistan following the ouster of the Taliban are included in
6 your database?

7 A. That's correct. Following the ouster, the initial phase
8 of the war, the opening phase of the war is considered a
9 conventional campaign by political scientists; so that would be
10 included in the dataset. The subsequent counterinsurgency
11 campaign would not be.

12 Q. Project Mars does not take into account purely naval
13 battles, right?

14 A. That is true as well, yes.

15 Q. Whether they occurred on the surface or with submarines,
16 right?

17 A. That's true.

18 Q. The only Navy-adjacent battles that are included in your
19 database is when there is substantial participation by Marine
20 ground forces, correct?

21 A. Yes.

22 Q. And then only the ground forces are accounted for,
23 correct?

24 A. Yes.

25 Q. Project Mars does not take into account air battles,

1 correct?

2 A. It does not. A solely air campaign or something like that
3 would not be included.

4 Q. So, for example, Project Mars, in its analysis of
5 inequality and the outcome of various wars, does not account in
6 any way for the effect of dropping the atomic bomb on Hiroshima
7 or Nagasaki?

8 A. It would not account for that, no.

9 Q. But that's an event, I assume, you would agree informed
10 the outcome of World War II?

11 A. Yes.

12 Q. Nor does Project Mars contain any measure for
13 technological superiority, correct?

14 A. That's actually true, yes, in terms of -- I'm not sure
15 what you mean by technological superiority. I assume weapons
16 systems or something of that nature.

17 Q. Correct.

18 A. Yes.

19 Q. There are some differences, for example, in the
20 technological capabilities of the United States Army which
21 invaded Afghanistan and the Taliban which was defending the
22 country, correct?

23 A. I would agree with that, yes.

24 Q. And you don't deny that technological superiority can
25 inform the outcome of a battle or a war?

1 A. Yes, it can.

2 Q. Would you agree with me the Project Mars database lists
3 the United States military as being in the lowest band of
4 inequality for every conflict it has participated in since
5 1900?

6 A. Lowest band. Yes, I believe that's correct.

7 Q. And your testimony, I think, is that armies in the lowest
8 band perform the best on the battlefield, correct?

9 A. Yes.

10 Q. And you would agree that United States ground forces have
11 thus fared quite well on the battlefield since 1900, despite
12 varying levels of historical state mistreatment of minorities?

13 A. I think that's true.

14 Q. And nothing in your military inequality coefficient
15 analysis depends upon the difference between the number of
16 minorities in the military and their numbers in society at
17 large, correct?

18 A. That is correct.

19 Q. And nothing in your military inequality coefficient
20 analysis turns upon the relative representation of minorities
21 in the military's officer corps, correct?

22 A. That is also correct. The index simply captures the
23 entire military rather than breaking it out by officer or
24 enlisted.

25 Q. All right. And, of course, you do not contend that the

1 United States today imposes anything like state-sanctioned
2 discrimination on minorities the way the country did in the
3 first half of the 20th century?

4 A. I would agree with that, yes.

5 Q. And maybe even a little bit beyond the first half if we
6 count the '60s, right?

7 A. Yes.

8 Q. You offered today some alternative testimony about the
9 military quality coefficient that one could use to affect the
10 United States military, right?

11 A. I'm sorry. I don't understand the question.

12 Q. There was a hypothetical about taking information from the
13 OPA reports, for example, and recalculating the military
14 inequality coefficient for the military?

15 A. Yes. If you wanted to calculate a military inequality
16 score for the United States today, that would be one way of
17 doing it, yes.

18 Q. If we bring up your report, DX195. I mean, you've got a
19 copy of it there in your binder.

20 A. I do have it in front of me, yes.

21 Q. Is a military inequality coefficient hypothetical premised
22 on the OPA reports anywhere inside that disclosure?

23 A. No. Actually, this is page-- I'm sorry. I don't have the
24 page in front of me. But I believe it's calculated from the
25 Ethnic Power Relations dataset, the most recent version.

1 Q. I think that's right.

2 If you just page through, Mr. Pusterla, I think we can
3 locate it pretty quickly here. I think it's after his first
4 opinion. Go back.

5 Do you recall it, Mr. Lyall? I think I have it in here.
6 I'm just trying to find what page you offer your Ethnic Power
7 Relations calculation.

8 I think it's on page 20 of the document, Mr. Pusterla,
9 probably 18.

10 A. Sorry. I believe it's on page 18.

11 Q. Right.

12 A. Is that the one you're referring to?

13 Q. Correct here, right.

14 This is where you refer to, in the middle of this
15 paragraph -- or the page, "Yet ethnic and racial discrimination
16 can arise from multiple directions, not simply from the formal
17 state policies that are captured by Project Mars's military
18 inequality coefficient."

19 Correct?

20 A. Yes.

21 Q. So just to be clear, what you're doing here is departing
22 from the methodology that you actually used in your book,
23 right?

24 A. The calculation is the same; the source of the data would
25 be different.

1 Q. Right. Because normally when you count -- when you
2 calculate the military inequality coefficient, you premise it
3 based on what the official state policies are, correct?

4 A. That is correct, yes.

5 Q. So if there's official discrimination against minorities,
6 like a segregation or economic discrimination, then it will get
7 a .5 value, I think, correct?

8 A. That's correct, yes.

9 Q. And if there's actual violent repression, it gets a 1
10 value, right?

11 A. Yes, that's correct.

12 Q. What you're proposing here is to use a different set of
13 data to treat minorities in America, I would say, differently
14 than what the official state policies are, correct?

15 A. Yes. Since we're out of sample and bringing it up to
16 date, we would draw on different data sources.

17 Q. I want to talk a little bit about the Ethnic Power
18 Relations dataset. In the next paragraph, that's what you used
19 in this case; is that right?

20 A. Yes.

21 Q. And you claim that this is the standard dataset for
22 political rights enjoyed by individual ethnic groups since
23 1945, right?

24 A. Yes. I believe it tracks starting in 1946, yes.

25 Q. Do you think it's reasonable to rely on this dataset to do

1 an alternative calculation of the military inequality
2 coefficient?

3 A. Yes. In the absence of having our coders do it because
4 United States isn't in and we're going to do a hypothetical,
5 this is a leading standard for dataset for Ethnic Power
6 Relations.

7 Q. And who comes up with the ratings that the Ethnic Power
8 Relations dataset gives to minority rights?

9 A. There is a team of about a hundred country experts who do
10 surveys typically on a three- to four-year cycle and assess the
11 country values.

12 Q. All right. So according to this -- it's in the middle of
13 your paragraph after Footnote 56 -- "Using the most recent data
14 from 2021, all non-White racial groups in the United States,
15 (including Latinos, African Americans, Asian Americans and
16 American Indians) are treated as holding no political power or
17 lacking the ability to wield influence at the national level of
18 executive power. Correct?

19 A. Yes. This is the EPR's judgment.

20 Q. And which, in your mind, is functionally equivalent to
21 explicit discrimination by federal authorities, correct?

22 A. Yes.

23 Q. And the federal government operates the Naval Academy,
24 right?

25 A. Yes.

1 Q. And this opinion -- well I should say this: To defend the
2 Naval Academy's use of race and admissions, they're relying in
3 part on your testimony today, right?

4 A. Yes.

5 Q. And that testimony includes that every minority group in
6 the United States of America living today under circumstances
7 equivalent to explicit discrimination by federal authorities?

8 A. So just to be clear, it does not refer to today.

9 Q. What is it referring to? 2021?

10 A. Yes. The data is collected in, as I said, these three- to
11 four-year bands. So the most recent data we have is 2021. The
12 EPR pegs their data to the first of January of every year in
13 the data.

14 So this is actually not referring to the situation today
15 in the United States. It is referring, in their coders'
16 judgment, to the United States as of 1 January 2021, and they
17 would have collected the data typically in 2019 and 2020.

18 Q. All right. So you didn't decide to update that data for
19 today?

20 A. I don't control the EPR, and the EPR dataset probably
21 won't be released, the next version, until at least next year.

22 Q. You agree that today all non-White racial groups in the
23 United States, including Latinos, African Americans, Asian
24 Americans, and American Indians, in fact, do hold some
25 political power and the ability to wield influence at the

1 national level and executive power?

2 A. I do, yes.

3 Q. Right. For example, the vice president of the United
4 States is African American, right?

5 A. Today, yes.

6 Q. And the Secretary of Defense is African American, right?

7 A. Yes, today.

8 Q. The vice president was the vice president-elect on
9 January 1st, 2020, correct?

10 A. I believe so, yes.

11 Q. Do you know whether or not the current United Nations
12 ambassador is African American?

13 A. I do, yes.

14 Q. She is?

15 A. Yes.

16 Q. Do you know whether the Secretary of Health & Human
17 Services is Hispanic?

18 A. Yes.

19 Q. Xavier Becerra?

20 A. Yes.

21 Q. And if I understand your testimony correctly, even if you
22 use this adopted assumption about minorities being subject to
23 the equivalent of federally imposed discrimination, the
24 military inequality coefficient of the United States military
25 would fall in the second lowest band?

1 A. If you use the 2021 EPR data to do this, yes, it would
2 fall in the second band.

3 Q. All right. Mr. Lyall, we talked earlier about the fact
4 that you don't have any idea as to how the United States Naval
5 Academy admissions process works, correct?

6 A. That's correct.

7 Q. So you don't have any opinion that ending the use of
8 racial preferences at the Naval Academy would increase the
9 number of people in the military who report discriminatory
10 events during their service, right?

11 A. I'm not sure I understood the question. Could you --

12 Q. You're not offering any opinion about what the effect of
13 ending preferences at the Naval Academy would have on the
14 members of the military who report discrimination?

15 A. I'm not offering an opinion on that.

16 Q. You're not offering any opinion on how the cessation of
17 the racial preferences at the Academy would affect members of
18 the Navy's beliefs that they share the same battlefield fate?

19 A. I'm not offering an opinion on that, no.

20 Q. You're not offering any opinion as to whether the
21 cessation of the racial preferences at the Naval Academy would
22 stoke any dissatisfaction among members of the United States
23 Navy?

24 A. I'm not offering an opinion on that either.

25 Q. And you're not offering any opinion that the cessation of

1 racial preferences at the United States Naval Academy would
2 corrode interracial or interethnic bonds at the United States
3 Navy, correct?

4 A. Correct.

5 MR. STRAWBRIDGE: Nothing further, Your Honor.

6 THE COURT: All right. Thank you, Mr. Strawbridge.
7 Mr. Robinson, any further questions?

8 MR. ROBINSON: Yes. Briefly.

9 THE COURT: How brief? Because we're going to take a
10 break soon.

11 MR. ROBINSON: Maybe three minutes, if that's okay?

12 THE COURT: I'm not trying to rush you, but if it's
13 going to be longer than that, we're going to take a break now.

14 MR. ROBINSON: We'll do it now, if that's okay.

15 THE COURT: Go ahead.

16 REDIRECT EXAMINATION

17 - - -

18 BY MR. ROBINSON:

19 Q. Good morning, Professor Lyall, just a few questions.

20 On cross-examination, Mr. Strawbridge asked you some
21 questions about why different subgroups of White ethnicities
22 were lumped together in World War II, for example, and why
23 Italian Americans, for example, weren't separated out as their
24 own subgroup.

25 Could you explain why that was the case.

1 A. Yeah. So we typically take from the time period the
2 orders of battle that were provided either the historical
3 sources or the militaries themselves.

4 And in these instances with the coders, they would have
5 taken what was true at the time, how they were represented in
6 the data.

7 I would say too, you could, in theory, break down these
8 groups into much more smaller groupings. Of course you would
9 only affect the inequality score if they were being treated
10 differently. If they're all being treated the same, it
11 actually would not affect the military inequality score.

12 Q. And was there some threshold that you and your team had
13 for the size of an ethnic group in order for it to be included?

14 A. Indeed. We have a numeric threshold so that small groups
15 would not be included in the dataset. So it was typically
16 1 percent of the fielded forces.

17 Q. All right. Mr. Strawbridge also asked you some questions
18 about the Ethnic Power Relations dataset. Are you creating the
19 Ethnic Power Relations data?

20 A. No.

21 Q. And why did you rely on it in your report?

22 A. So the Ethnic Power Relations is the leading standard for
23 all of our measures of Ethnic Power Relations in a particular
24 country. It's been cited thousand and thousands of times. It
25 has launched hundreds of studies and is seen as the industry

1 standard.

2 So in the absence of having data that we've collected --
3 because, again, the United States is not in the dataset at this
4 time period -- it seemed like this would be a reasonable use of
5 the data.

6 **Q.** And Mr. Strawbridge also asked you about, I think, some
7 specific data points involving the Civil War, World War II.
8 Given the breadth of armies and battles that you looked at, if
9 you were to remove those specific data points from your
10 analysis, would that affect the overall trend lines that you
11 were seeing in the data?

12 **A.** No, it wouldn't. I mean, we referred to, I believe, three
13 specific examples. There's 825 in the dataset. So removing
14 the three likely wouldn't change the findings.

15 **MR. ROBINSON:** Nothing further.

16 **THE COURT:** Thank you, Mr. Robinson.

17 Any recross just on that point, Mr. Strawbridge?

18 **MR. STRAWBRIDGE:** No, Your Honor.

19 **THE COURT:** Thank you, Dr. Lyall. You may step down.
20 You shouldn't discuss your testimony with anyone in the event
21 that you're called back to the witness stand before this trial
22 is over this week.

23 So, with that, we'll take a 10-minute late-morning recess.
24 And then we'll start, I believe, with -- Admiral Fuller is the
25 next witness; is that correct?

1 **MR. GARDNER:** Correct.

2 **THE COURT:** All right. Court stands in recess.

3 **THE CLERK:** All rise. This Honorable Court is now in
4 recess.

5 (Recess from 11:49 a.m. to 12:08 p.m.)

6 **THE COURT:** You all may be seated.

7 Next witness, Mr. Carmichael.

8 **MR. CARMICHAEL:** Yes. Defendants will call Vice
9 Admiral Fuller.

10 **THE COURT:** Good morning, sir. If you'll come forward
11 and be sworn.

12 **THE CLERK:** Thank you, sir. You can stand right here.
13 And if you don't mind raising your right hand for me.

14 (Witness sworn.)

15 **THE CLERK:** Thank you. You can have a seat.

16 Please state and spell your first and last name for the
17 record.

18 **THE WITNESS:** My name is John Vincent Fuller, J-O-H-N,
19 F-U-L-L-E-R.

20 **THE CLERK:** Thank you.

21 **THE COURT:** You may proceed, Mr. Carmichael.

22 **DIRECT EXAMINATION**

23 **BY MR. CARMICHAEL:**

24 **Q.** Good afternoon, Admiral Fuller.

25 Where are you currently employed?

1 A. I'm currently the Naval Inspector General, employed in the
2 Washington Navy Yard.

3 Q. For the United States Navy?

4 A. For the United States Navy.

5 Q. And what's your current military rank?

6 A. Vice admiral.

7 Q. Is that a three-star position?

8 A. Three stars.

9 Q. You answered this, what your current job is; but what's
10 the -- what is the duties of the Navy Inspector General?

11 A. The Naval Inspector General looks into matters of
12 importance for the Department of the Navy. We have two
13 principal lines of effort. We inspect and we investigate
14 things. So we're looking for issues that affect readiness for
15 the Department of the Navy.

16 Q. When did you assume this position?

17 A. June of 2021.

18 Q. I want to walk through your background a little bit.

19 Are you a graduate of the Naval Academy?

20 A. I am.

21 Q. What year did you graduate?

22 A. 1987.

23 Q. Did you apply to the Naval Academy from high school?

24 A. I did.

25 Q. What made you want to go to the Naval Academy?

1 A. My father was in the military service, my mother was, my
2 brothers had served. So I thought it was an honorable way to
3 pursue an education. I was also recruited to play football,
4 and I thought the Naval Academy offered me great opportunities
5 for the future.

6 Q. Did you play football all four years?

7 A. I did.

8 Q. Did you receive a nomination?

9 A. I received a nomination. Because my father is in the
10 military, I received a Presidential nomination, but I did apply
11 for congressional as well.

12 Q. Do you remember where you ended up in the class, your
13 class rank?

14 A. I was around 700 of 1,000 in my graduating position.

15 Q. Is anyone in your class still on active duty?

16 A. So I'm the senior Navy member of the United States Navy.
17 There's a Marine, Lieutenant General Greg Masiello. And the
18 CNO of the Peruvian navy is also a classmate. But we're the
19 last three in uniform.

20 Q. Is three-star the highest rank obtained from anybody in
21 your class?

22 A. It is. There was three -- Vice Admiral White, who is
23 retired. And then there's Lieutenant General Masiello and then
24 myself.

25 Q. Do you have a graduate degree?

1 A. I have two graduate degrees.

2 Q. What are those?

3 A. Master of science from the Naval Postgraduate School and a
4 master of national security studies from the Naval War College,
5 but it was the Command & Staff College.

6 Q. Now I want to go through your military career a bit.

7 All total, how long have you been on active duty in the
8 Navy?

9 A. If you count commissioned service, 37 years. If you add
10 time in uniform, plus years for the Academy; so 41 years in
11 uniform.

12 Q. And what service community did you select in the --

13 A. I'm a surface warfare officer.

14 Q. Is that an unrestricted line officer?

15 A. It is unrestricted line.

16 Q. What is a surface warfare officer?

17 A. Surface war officers are those officers who operate,
18 maintain, lead on surface combatants. The best way of
19 describing this is we would command every surface combatant
20 except for aircraft carriers, which are statutorily restricted
21 to aviation officers. So we drive, operate, and maintain
22 surface ships or warships.

23 Q. What specific type of ships do --

24 A. Destroyers, cruisers, littoral combat ships, also
25 amphibious ships, the assault craft, the large-deck amphib.

1 So we can command all of those, and we operate and work on all
2 of those type of ships.

3 Q. What does the gold pin on the top of your left side mean?

4 A. That is my surface warfare officer pin. And that was --
5 being a surface warfare officer, you have a visible designation
6 of what community you're in. That's about an 18-month
7 qualification process on your first platform, at least that's
8 my situation.

9 Q. At a high level, could you walk us through your -- the
10 various jobs that you've had in the Navy or the billets you've
11 had?

12 A. So my first ship was a frigate, USS Vandegrift. I was a
13 division officer there. I was there for about three years.

14 My second ship, the USS Coghlan, was another frigate. I
15 was the chief engineer.

16 After that, I did additional department head tours where I
17 was at the propulsion examining board. And I was also the flag
18 secretary for amphibious forces, 7th Fleet.

19 Following on that, my next sea tour was XO on the USS
20 Curtis Wilbur. That was four deployed naval courses. That was
21 a guided-missile destroyer out of Japan.

22 Next sea tour was USS Mason, where I was a commanding
23 officer. Do you want sea tours or do you want everything?

24 Q. Everything.

25 A. So between Curtis Wilbur and going to the Mason, I was at

1 the -- and C&O staff, called OPNAV.

2 Post being on the USS Mason, I went to the Naval Academy
3 as a battalion officer.

4 After that, I was military assistant on the office of
5 Secretary of Defense's staff.

6 After that, I was a deputy commodore of Destroyer
7 Squadron 22 during my deployment on the George Herbert Walker
8 Bush. I was also the commanding officer Task Force Iraqi
9 Maritime. We turned over the oil platforms to the Iraqis.

10 Post -- then after that, I was the destroyer squadron
11 commodore. That was around 22.

12 Following that, I worked on the OPNAV staff.

13 Following that, I made flag, and I went to naval region
14 Hawaii. And I was also Naval Service Group, Middle Pacific.

15 Following that, I was commander of Carrier Strike Group 1
16 on the Carl Vinson stationed in San Diego.

17 Following that, I was the J5, which was the head of plans,
18 policy, and strategy for U.S. Northern Command and NORAD.

19 Following that, I went to the joint staff. Three jobs
20 there. I was the DDFP, deputy director of force protection.
21 Major roles there, I was the leader for JIAMD0, Joint
22 Integrated Air and Missile Defense Organization. I was the
23 head of the JRO, Joint Requirements Office, for chemical,
24 biological, and radiological defense. I was also the president
25 of the defense board.

1 All these jobs were driven on joint requirements and how
2 you validate those.

3 And then post that, I became the Naval Inspector General
4 in 2021.

5 Q. And how many times have you deployed in your career?

6 A. At least nine.

7 Q. Where have you deployed to?

8 A. I've deployed to the Persian Gulf several times. I've
9 deployed to the Mediterranean. I've deployed to the Pacific
10 fleet are the main areas. So Pacific, Persian Gulf, and areas
11 around Europe in the Mediterranean.

12 Q. Were any of these areas considered combat zones?

13 A. In the Persian Gulf, we got hazardous duty pay. Again, I
14 have not actually been in combat, but we were certified for
15 combat operations every time we deployed. And we were in
16 situations that could have gone kinetic depending on the
17 circumstances. So lots of time in the Persian Gulf where we
18 were involved in some tense operations.

19 Q. What do the ribbons your uniform underneath your SWO pin
20 represent?

21 A. Those are various individual awards and awards for service
22 in different areas.

23 I know the next question. I'll go through them.

24 The top few are individual awards. So I have a Navy
25 Commendation Medal, Navy Achievement Medal, Meritorious Service

1 Medal, Legion of Merit, and a Defense Superior Service Medal.

2 And then you'll see on there, there's stars or other
3 things saying I've got multiples of those. So I think about a
4 dozen personal awards or more.

5 Q. Is there anything on your uniform that signifies that you
6 held command at sea?

7 A. I have the -- I'll point at it -- Command at Sea pin right
8 here. And as I've mentioned before, I was the commanding
9 officer of USS Mason, commanding -- or commodore for Desert
10 Storm Squadron 22. And I was the commander of Carrier Strike
11 Group 1. So three at-sea commands that I have the Command at
12 Sea pin for.

13 Q. What type of ship is the Mason?

14 A. The Mason is a guided-missile destroyer, Arleigh
15 Burke-class destroyer, Flight IIA.

16 Q. And you said your second sea command was a destroyer
17 squadron. What's that?

18 A. So a destroyer squadron is the 06, or captain position,
19 and I was the captain of ships. So we had frigates and
20 destroyers that worked for me. So when I was the Mason CO, I
21 was the commander, an 05. As the 06, I had multiple 05s that
22 worked for me.

23 Q. And you mentioned a carrier strike group. What is that?

24 A. So a carrier strike group is the position that you -- as a
25 one-star or a two-star, you have the 06s work for you. So the

1 way the organization is is you'll have a destroyer squadron
2 work for you, you'll have an aircraft carrier, a carrier, air
3 wing work for you, and you'll have your warfare commanders and
4 a cruiser for air warfare.

5 Q. So about how many ships is in a --

6 A. It varies. Mine, because we had a special circumstance,
7 we had about five ships. So a carrier strike group can have
8 between 7,000 and 10,000 personnel.

9 Q. Is there anything on your uniform that signifies command
10 ashore?

11 A. So the pin next to this one with the trident is Command
12 Ashore. And I was the commander of Navy, region Hawaii; so if
13 you look at the responsibility, all of the land in Hawaii that
14 the Navy owned and operated. And probably between civilians
15 and military, 35,000 people. And I don't remember the specific
16 square footage, but it was a pretty large area if you think of
17 all of the space in Hawaii and Kauai.

18 Q. Is there anything on your uniform that signifies that you
19 served in a joint billet?

20 A. I have the badge for the joint staff, and I have a badge
21 for working on the Secretary of Defense's staff.

22 Q. Are you a joint qualified officer?

23 A. I am.

24 Q. What does that mean?

25 A. So joint qualified means you have both the joint

1 professional military education and you've also done a joint
2 tour. So you have experience and education that goes with
3 that.

4 Q. Having done a joint tour, what are some of the primary
5 cultural differences between Navy and Army and Air Force?

6 A. So I'll start off with the general operating parameters
7 for the different services.

8 Navy being maritime, we work at sea. Lots of
9 independence. We're expeditionary.

10 If you think of the Army culture, it's a land-based heavy
11 organization, garrison-based.

12 And then the Air Force is, I'll say, focused on aviation
13 and not as expeditionaries either. And there's just different
14 cultures when you operate independently at sea, when you
15 operate well supported ashore, and when you operate forces that
16 provide air support.

17 So just think -- if you can think of the differences
18 between land, air, and sea, there's a whole cultural difference
19 that goes with how you operate in those environments and how
20 you man, train, equip, and how you sustain those and maintain
21 those forces.

22 Q. Is there a Navy component in the National Guard?

23 A. There is no Navy component to the National Guard.

24 Q. Is it correct that the Navy instead has its own Navy
25 reserve which is not part of a state National Guard?

1 A. That's an accurate characterization.

2 Q. Are there culture differences between the Navy and the
3 National Guard?

4 A. There are.

5 Part of the difference is the authorities. National Guard
6 has Air Force and Army components; so you have that culture.
7 And they each also work for a governor under Title 32. So
8 there's just different ways of how they are organized,
9 equipped, and how they're manned.

10 So if you think of the difference of each National Guard
11 works for a state. There is no Navy National Guard. So
12 there's just differences in how they're organized and how
13 they're command and controlled.

14 Q. Could a general in the National Guard, even if joint
15 qualified, ever be put in command of a Naval vessel?

16 A. I can't think of any circumstances. Particularly a
17 general or flag officer don't command ships. And then there's
18 not the experience base to do that. You can't just go become a
19 ship captain without all the qualification and experience and
20 certifications to make sure you're going to be successful at
21 the job.

22 Q. Given the differences between the services, do you think
23 that there would be limits in the ability of a senior officer
24 from the Air Force National Guard, even if joint qualified, to
25 opine on matters such as military readiness and unit cohesion

1 in the Navy?

2 A. Yes. And I think they could talk about, in general terms,
3 the what. But the how is something that would be very
4 difficult to explain.

5 Quick example. I described before I was working at NORAD,
6 NORTHCOM, and I was the J5; so I had the plans. As we looked
7 at doing homeland defense and I was talking with my Air Force
8 partners, they understood that a ship would be positioned
9 somewhere, but they didn't really understand the nature of how
10 a maritime platform would conduct ballistic missile defense and
11 antisubmarine warfare simultaneously because they didn't have
12 the experience to actually understand the dynamic nature of
13 operations.

14 They understood that they should be there and they
15 understood what generally they were supposed to do, but how
16 they do that would also be very important to how you'd write
17 the plans. So that's where being joint qualified started the
18 conversation, but we had to bring in the experts in each of
19 the -- how you operate the force to make sure that we were
20 properly making plans to how to employ them in the future.

21 Q. So how many sea tours total have you been on?

22 A. Every ship I was on was a sea tour. And I'm going to have
23 to do public math here. Propulsion examining board was a sea
24 tour, surprisingly. Amphibious force, 7th Fleet, was a sea
25 tour. So 10? I'm making a number here. I'd have to count

1 back. But if you look at my service record, my LES, I've got
2 close to 14 years of sea duty.

3 Q. In your current position, do you still go on ships?

4 A. I would go on ships to assess them, but I no longer
5 operate ships as a flag officer in the way the C2 is. I would
6 only go there in my role as inspecting or investigating, or
7 visit.

8 Q. For your job commanding a carrier strike group, that was
9 on shipboard, right?

10 A. Correct. We were an embarked staff on the USS Carl
11 Vinson.

12 Q. Based on your experience, has shipboard life changed over
13 the last 30 years?

14 A. Absolutely. If you think about how technology has changed
15 in the past 30 years, if you think about how people have
16 changed, the things that we attempt to do -- provide power
17 projection, sea control, presence -- hasn't changed, but the
18 nature of the operations has changed significantly.

19 Just with the proliferation of technology, the way people
20 are trained, it's all vastly different. And even the
21 disposition of how the crews are manned are different from when
22 I started off to now. So it's different because the people are
23 different. It's different because the technology is different.

24 Q. Given the changes in the Navy over the last 30 years, do
25 you think that there would be limits in the ability of someone

1 that last served on a ship 30 years ago to opine on matters
2 such as military readiness and unit cohesion in Navy units
3 today?

4 A. And I'll go back to what I said before. It's the how, not
5 necessarily the what. So unit cohesion, yes, we're supposed to
6 work together. We have an idea of what the requirements are.

7 But understanding the difference in people and
8 understanding the difference in technology, I think you
9 couldn't opine with any great degree of credibility because you
10 have to be in that experience.

11 Just like if you asked me, tell me about an Air Force
12 squadron or an Army tank battalion, I know generalities, but I
13 don't have that personal experience or that cultural
14 understanding or that experience to really give great details,
15 I would say. You know, I could be PowerPoint deep.

16 Q. Okay.

17 Could we now put on the screen DX66.

18 Did I hit something wrong on this?

19 **THE COURT:** Defendants' Exhibit 66?

20 **MR. CARMICHAEL:** 66.

21 **BY MR. CARMICHAEL:**

22 Q. Admiral Fuller, have you seen this document before?

23 A. I have.

24 Q. What is this document?

25 A. This is the Secretary of the Navy's strategic guidance for

1 the Navy and Marine Corps team from October 2021.

2 Q. In your current position as Navy IG, who do you report to?

3 A. I'm a direct report to the Secretary of the Navy.

4 Q. Could we turn to page 4 of the document.

5 And do you see at the top of the page where it says
6 "enduring priorities"?

7 A. Yes.

8 Q. What are the Secretary of the Navy's enduring priorities?

9 A. So looking at the page here, I'll just go down to where
10 you have the three bullets. Expand forward presence, enhance
11 warfighting readiness, and innovate and modernize.

12 Q. Okay. I want to flip to page 5 of this.

13 Do you see the one labeled "Empowering Our People"?

14 A. I do.

15 Q. What is that particular priority?

16 THE COURT: Mr. Carmichael, it might be helpful if we
17 do this -- if someone can lift these up as you're going to
18 them, it would be helpful. We didn't lift the last one.

19 Okay. Now we've done it. Thank you very much.

20 THE WITNESS: Thank you. That's much easier to read.

21 BY MR. CARMICHAEL:

22 Q. What is empowering people about?

23 A. The text here, "Our people provide the foundational
24 strength for this department. In fact, I believe our
25 high-quality forces provide us a competitive warfighting

1 advantage in relation to our strategic competitors. We will
2 build and sustain a strong, diverse, and healthy force, ready
3 at all times and focused on warfighting and leadership at every
4 level.

5 "We will reward initiative and creativity and further
6 enhance the reputation of the Department of Navy and its
7 services as great places to lead, work, grow, and build
8 families."

9 Q. Okay. I want to go specifically into enduring priorities
10 a little bit.

11 So if we go to page 6, pull that down and go to page 6.

12 I want to pull up one specifically to talk about cultivate
13 talent and teamwork.

14 Could you read the first two sentences of this part of the
15 secretary's guidance.

16 A. Yes.

17 "We will build the strongest possible warfighting force by
18 recruiting, retaining, and promoting the best that America has
19 to offer. Our department can only overcome the complex
20 challenges we face every day by cultivating the talent and
21 unique insights of individuals from diverse personal, cultural,
22 and professional backgrounds."

23 Q. Admiral Fuller, do you agree with that statement?

24 A. I do.

25 Q. Why?

1 A. It makes sense if -- you know, we talk about in the
2 military and the Navy our number one asset is our people. So
3 building, retaining, generating, doing all the things that make
4 sure our people are as good as they can be just makes sense to
5 meet our mission to defend the nation.

6 Q. Okay.

7 Could we take that down and now switch to DX67.

8 Admiral Fuller, have you seen this document before?

9 A. Yes.

10 Q. What is this document?

11 A. This is Secretary Del Turo's statement on the Department
12 of the Navy posture before the Senate Committee on
13 Appropriations from May 26, 2022.

14 Q. And I want to go to page 13, where the secretary talks
15 about empowering our people again. So it'll be page 13.

16 Do you see again where it says "Empowering People" at the
17 top?

18 A. Yes.

19 Q. And then for the subset, for building the future force,
20 could you read that section, Admiral.

21 A. "To maintain a fleet prepared to fight and win in
22 long-term strategic competition, we must continue to evaluate
23 and improve our capability to attract, retain, and develop a
24 talented and diverse workforce. We face an intensely
25 competitive job market for talented workers and a rapidly

1 evolving tactical and technical landscape driving us to
2 modernize and enhance our entire talent management approach in
3 order to succeed."

4 Q. Do you agree with that statement, Admiral?

5 A. I do.

6 Q. Why?

7 A. Again, it makes sense. We are building the force, and
8 we're trying to make sure that we have the right workforce to
9 maintain the force. So, again, if you want to have a
10 high-quality force, you need to make sure we do everything we
11 can to make sure we have the best workforce.

12 Q. Could we go to page 15. I want to pull out the section
13 specifically from 15 which is also under "Empowering People."

14 This one's headed "Diversity, Equity, and Inclusion."

15 Could you read that portion as well.

16 A. The whole section?

17 Q. Yes, please.

18 A. "In order to meet the challenges of a complex world, we
19 must continue to recruit, retain, train, and promote the best
20 from all of America. We need a diverse force so every child in
21 America can see themselves wearing the uniform or working in
22 our civilian ranks tomorrow, and every viewpoint is represented
23 in our operations today so we can draw talent from all of
24 America to build our warfighting advantage. This is a national
25 security imperative and a critical aspect of the DON's" --

1 Department of Navy -- "diversity, equity, and inclusion
2 initiatives."

3 Q. Based on your work with Secretary Del Turo, what is your
4 understanding of what the secretary means there when he's
5 talking about a diverse force?

6 A. So a couple things. The Secretary of the Navy is
7 responsible for Title X issues where you train, man, and equip.
8 So a diverse force has two meanings for me.

9 One, it's the equipment that we operate, which he's
10 responsible for. And if you look at his staff, he's also
11 responsible for the workforce or the people. And that's where
12 diversity, equity, and inclusion comes into play, where he's
13 trying to use this as a means to help enhance the workforce.

14 And, again, it states that that's an imperative to make
15 sure we have the best workforce possible and the best force
16 possible to make sure we maintain our national strategic
17 objectives.

18 Q. Do you agree with this statement?

19 A. I do.

20 Q. Is racial and ethnic diversity a component of the
21 diversity the Navy seeks?

22 A. Say that again, please.

23 Q. Is racial and ethnic diversity a component of that
24 diversity that the Navy seeks in its people?

25 A. It is a component of the diversity we seek in our people.

1 Q. Do you think that race and ethnicity can be decoupled from
2 the Navy's view of diversity?

3 A. I don't see how they could.

4 Q. Okay.

5 We could pull that down now.

6 MR. CARMICHAEL: My understanding this is now admitted
7 into evidence, Your Honor?

8 THE COURT: Yes, absolutely. Defendants' Exhibit 66
9 and 67 are both in evidence, Mr. Carmichael.

10 BY MR. CARMICHAEL:

11 Q. Admiral Fuller, what interest does the Navy have in a
12 diverse officer corps?

13 A. The Navy has a compelling interest in a diverse officer
14 corps, and I'll give you some reasons why.

15 A diverse officer corps helps with unit cohesion. It
16 supports readiness. It helps with recruiting and retention.
17 And it also helps us with credibility both domestically and
18 internationally.

19 Q. Does that interest include racial and ethnic diversity?

20 A. Yes.

21 Q. Why does diversity, in your view, include racial and
22 ethnic diversity?

23 A. It is a component. If you're talking individuals,
24 individuals have many elements that characterize who they are.
25 And I think racial and ethnic diversity is something you see

1 about people.

2 As an example, I think it's pretty evident here that I'm a
3 Naval officer, I have glasses, I don't have much hair, I'm an
4 African American. It's just something that you see as part of
5 who I am.

6 And to say that I'm not one of those things is not taking
7 into account that I'm a unique individual who's trying to do --
8 a unique individual who's part of a larger collective.

9 And I think a diverse workforce gives us opportunities,
10 and it reduces risk for the type of missions we're responsible
11 for.

12 Q. How does the Naval Academy further that interest in a
13 diverse officer corps?

14 A. The Naval Academy is one of the sources where we
15 commission officers, and if you look at how the Navy works,
16 officers lead the operating forces.

17 So the Naval Academy is an insertion point for the future
18 commissioned officers who will lead and serve for many years to
19 come. So it's important, because we have a closed-loop system
20 for our officer corps where you can't bring them in at later
21 stages in their career, that you have to make sure that they
22 get the right candidates through the Naval Academy and then
23 make sure we get the best possible candidate with the most
24 potential for success into the Naval Academy.

25 So it's a critical insertion point for the officer corps.

1 Q. I want to pack a little bit of what you talked about, the
2 compelling interests. You testified that a diverse officer
3 corps helps unit cohesion; is that correct?

4 A. That is correct.

5 Q. What did you mean by "unit cohesion"?

6 A. I'll give you an example that I think it's non-Navy, but
7 it's probably helpful here.

8 If you've heard a professional symphony -- professional
9 orchestra play, you can hear how well it sounds and how there's
10 great cohesion between all the different players and all the
11 different instruments. I'm sure many of you have also been to
12 probably an eighth grade concert where it's a symphony, but
13 they just don't sound as good.

14 So the difference is, maybe the same instruments playing,
15 but you can hear the difference between the professional,
16 well-organized, synchronized group in its unity of efforts,
17 unity of performance, unity of play, and they're very attuned
18 to each other versus that eighth grade band, still playing the
19 same piece of music, but it doesn't sound as good.

20 So unit cohesion is high-quality professionalism like a
21 symphony versus your eighth grade band.

22 Q. How is unit cohesion unique in the shipboard environment?

23 A. So the operating environment on a ship is not your average
24 environment. A shipboard environment is driven by multiple
25 organizations that will stack on top of each other and work in

1 cohesion.

2 So back to my orchestra thing. You have, on a ship,
3 different divisions, which is your smallest group led by junior
4 officers. And then you have divisions that combine to be
5 departments. An example, you'll have an engineering
6 department, an operations department kind of systems. And then
7 they're led by a commanding officer.

8 When you get underway, you're operating 24/7 for as long
9 as you're out there. So there's always activities going on,
10 and they always have to be synchronized so you don't have
11 casualties or blunder or something that causes the ship not to
12 operate.

13 So it's a constantly operating environment. And that
14 requires a lot of unit cohesion where the teams are working
15 well together, that they have respect. And they also have to
16 be very sensitive to casualties, they have to be sensitive to
17 changes in environment, and they have to always be working
18 together because, if not, you'll have -- as we've seen in some
19 very sad cases where ships didn't operate well and people got
20 hurt and very expensive equipment was damaged.

21 So unit cohesion is the glue that keeps the ship operating
22 safely and, when necessary, will make sure they are able to
23 operate lethally in a combat situation.

24 **Q.** How does a diverse officer corps help to ensure unit
25 cohesion in a shipboard environment?

1 A. And I'll say diverse officer corps, including racial
2 diversity, it's an environment where you have respect; it's an
3 environment where you're able to work through unscripted
4 scenarios; it's an environment where, in a compressed area,
5 you're able to operate safely, and you're going to have to
6 operate very, very coherently.

7 So diverse officer corps is the group that leads the
8 people. And if you don't have good leadership in those very
9 stressful environments, you're going to have a lot of cases of
10 missed opportunities to do good things, you're going to have
11 poor execution, poor maintenance, poor training.

12 But in a -- in an organization where you have good unit
13 cohesion, you're going to see all of these things work well
14 together.

15 Again, I'll go back to the simple, a band where the
16 orchestra sounds really good together or the one that tries
17 hard but doesn't have the same performance.

18 Q. Do you have any examples of diversity furthering unit
19 cohesion in the Navy environment from your career?

20 A. So the best example I can give you, as I talked about the
21 different ships I was on, my first two ships were
22 single-gender; there was no mixed-gender crews there.

23 And we were really good ships. But as I became more
24 senior and I was on a mixed-gender crew, I saw the difference
25 in a better operating environment; there was greater degree of

1 respect and greater sense of professionalism when I saw a
2 mixed-gender crew.

3 And it's just interesting to describe how much more
4 professional and respectful I think the environment was once we
5 got to mixed-gender crew. Not perfect by any stretch of the
6 means, but when I look at the ones that I would say would be a
7 better example of what a better crew looks like, I think the
8 mixed-gender crews I served on were far superior than the ones
9 I served on as a junior officer.

10 **Q.** Do you have any examples of diversity changing someone's
11 perspective in the shipboard environment?

12 **A.** Yes. My first ship was commanded by an officer who was
13 about 19 years senior to me, a 1968 graduate from the Naval
14 Academy. And on my exit interview when he was detaching the
15 ship, he gave me some -- which I thought was pretty interesting
16 insight. He was a Naval Academy graduate, and he said, "John,
17 when I heard you were coming to the ship, I was concerned. A
18 couple of reasons. One, you were a football player" -- and
19 there was just a reputation for Navy football players when he
20 was at the Academy -- "and you are African American. So I had
21 these two biases against you. I didn't know you. Just my
22 experience was you're probably going to be less professional
23 and you're going to try to slide by, you're not going to work
24 hard. And I just had kind of lower expectations. But you
25 really impressed me because you were a great naval officer."

1 Again, I don't want to toot my own horn here, but -- "You did
2 what you were supposed to; you worked hard; you were a great
3 team player; you were great in the wardroom; you worked hard;
4 and you were on point for all the things we expect from a naval
5 officer. You made your qualifications early. And I just want
6 to say I was surprised, pleasantly, that you showed me that my
7 biases were -- I shouldn't have judged the book by the cover
8 because all the things I'd kind of come to learn about football
9 players and African Americans from my experience in the Navy
10 weren't as positive as the ones I had with you."

11 Q. How does diversity within the officer corps on a ship
12 increase the performance of a ship?

13 A. Think of a wider range of perspective. I'll say
14 diversity, including racial and ethnic diversity, you have
15 people there who are engineers; you have people there who are
16 historians; you have people who have a wide array of
17 experiences.

18 And when you have a wide array of experiences, you're able
19 to adapt more eloquently to unscripted or even difficult
20 situations. When you have a wide array of views, you have, I
21 think, a greater opportunity to work through solutions. You
22 also mitigate the risk of having groupthink or being unable to
23 think outside the problem.

24 I think that diversity is what's really good about naval
25 officer professionalism is you're not overwhelmed by unusual

1 problems and you have the ability to have to apply diversity of
2 thought and experiences and perspectives to mitigate risk, to
3 seek -- to seize opportunities, and to think through really
4 challenging problems.

5 Again, most of the times in the naval warfare thing,
6 you're not -- you don't readily have resources to come and
7 help. You've got to solve all the problems locally. It may be
8 days, it may be hours, it could be weeks before you're going to
9 get support from other sources there. So you've really got to
10 figure things out when you're out there alone and unafraid.

11 Q. Is it your view that a ship with a racially diverse
12 leadership is better at launching Tomahawk missiles than a
13 nondiverse unit?

14 A. There's no -- if the single difference between two ships
15 is the race of the crew, there's no credibility to say there's
16 any difference. I don't know how you'd make that assessment.

17 Q. Is it your view that a ship with a racially diverse
18 leadership is better at detecting enemy submarines than a
19 nondiverse ship?

20 A. Same thing. If the only difference is the racial
21 composition of the crew, there's no way to say that that's a
22 reasonable assumption to make.

23 Q. If you can't say that a racially diverse wardroom of a
24 ship will be more effective at these tasks, then what is the
25 benefit of a racially diverse officer corps in terms of

1 cohesion and readiness?

2 A. So forgive my glibness here, but if you talk about a
3 racially diverse group, I'd say U.S. Navy, and the people that
4 we find as our principal potential competitor in the future,
5 say the Chinese Navy, I would bet on the racial diversity and
6 the ability of people to think outside the box of an American
7 crew versus a Chinese crew.

8 But the benefit is that training and that sense of respect
9 for your crew and that ability to work through issues I think
10 is what the hallmark of our great success is, is we have people
11 who treat each other with respect, people who think through
12 difficult problems, and people who are not overwhelmed by
13 unusual problems.

14 But, again, if you're going to really look at the example
15 of what that homogeneous group looks like, I would definitely
16 take the U.S. Navy over the Chinese Navy.

17 Q. Admiral Fuller, I want to talk about recruitment. You had
18 mentioned that as well. You testified that you believe diverse
19 officer corps, including race and ethnicity, improved
20 recruiting; is that right?

21 A. I do.

22 Q. How does the diversity of the officer corps help with
23 recruiting?

24 A. So diversity, including racial and ethnic diversity, help,
25 when you're recruiting someone, when you're having someone

1 offering to volunteer, there should be some relatability to
2 what they're trying to do.

3 As I read from the Secretary's thing, it's where we'd like
4 people to be able to see themselves in that position. So if
5 you relate to someone because of their race, you may relate to
6 someone because of where they grew up, you may relate to
7 someone because of what they do.

8 But we're trying to recruit and get the best talent to
9 come on board, and they have to be able to envision themselves
10 as one of the people they're volunteering for.

11 So it just makes good common sense to have a sense of
12 relatability for the people we're trying to get to volunteer in
13 our all-volunteer force to join us.

14 Q. Are there any examples from your career that have helped
15 you form this opinion?

16 A. Yes. Not so long ago, I was at a Junior ROTC review where
17 I was the guest speaker. And it was interesting as I talked
18 with the parents and the influencers afterwards, they were
19 surprised and kind of happy to see that there was an African
20 American three-star, but also they wanted to make sure that
21 their JROTC kids would come up and take pictures with me just
22 to say, look, it's possible for you, as a high school student,
23 to potentially be a three-star in the United States Navy. It's
24 a possibility.

25 Another example, not of myself, but if you look at the

1 Navy today, the CNO is Admiral Franchetti, a female. It's
2 interesting seeing the energy she generates there for people
3 who didn't think that was possible, but she is the chief of
4 naval operations, the most qualified senior officer in the
5 Navy -- again, I know Admiral Grady is on the joint staff.
6 She's got a family. And she's proven that regular people of
7 high quality can do that.

8 So it's -- it's empowering, it's energizing to see that
9 this type of diversity is something that, based on your skills,
10 you can actually become the number one person in an
11 organization as large as the United States Navy. I'll say a
12 senior officer of the United States Navy. The Secretary is
13 the --

14 **Q.** And you also testified earlier, Admiral Fuller, that you
15 believe a diverse officer corps enhances retention; is that
16 correct?

17 **A.** For the same reasons. When you're getting mentored or
18 mentoring, there's two things. You like to hear from somebody
19 who has things like you; you also like to hear from someone who
20 has different perspectives there so you can make a holistic
21 determination on what your options are.

22 So I think, just like there's a relatability to someone
23 who's got the same characteristics, it's also nice to get the
24 perspective of someone who's different. It kind of -- again,
25 I'm repeating myself, but how do you take that fuller range of

1 advice there and apply it to yourself?

2 So it is absolutely helpful for retention.

3 Q. Admiral Fuller, earlier you testified that you believe
4 diversity officer corps serves to increase the credibility of
5 the Navy both domestically and abroad; is that right?

6 A. That is.

7 Q. What did you mean by domestic credibility?

8 A. I'll go back to the high school example. Parents,
9 influencers, teachers, and the students all were interested in
10 the fact that they could be three-star. I've been in places
11 where people are interested in the fact that you can actually
12 be a pilot, you can be a SEAL, you can be an engineer,
13 explosive ordnance person. So the relatability of that to the
14 population is very important.

15 They want to know that their volunteers, the 1 percent of
16 people who are representing them, are real people, real,
17 relatable people, and people that they can be proud of.

18 So from a credibility purpose, they want to know that
19 people like them are protecting them is my opinion. And I
20 think that that's a powerful thing because we're not separate.
21 As we look at relatability, it now says they could be one of
22 those people too. And that credibility means like, wow, we
23 could also join that really elite group.

24 Q. You also testified that a diverse officer corps increases
25 the Navy's international credibility; is that right?

1 A. I do. It's another component of being a naval officer and
2 a culture thing is we are all told and we are actually
3 ambassadors because we go to port visits to other countries.

4 It's interesting as you watch the sailors go ashore, you
5 see these diverse groups going out there, and everyone says,
6 those are Americans, because it doesn't matter where you're
7 from; people just kind of go out as groups of Americans and we
8 look like Americans.

9 Kind of similar example is we just had the Olympics
10 recently. When you look at the different teams of Americans
11 out there, we look like all sorts of things mixed together
12 physically. Look at the women's gymnastics team. Everyone
13 knew it was an American team, and everyone knew the thing that
14 was similar was that they all had USA on their uniforms.

15 But how the people looked and how they worked together was
16 a great example of how far a diverse group picked the best
17 people, and they had this incredible dominance internationally.
18 And everyone just knew that's just how Americans are. They
19 take their diversity; they blend them together; and they make
20 great teams.

21 So I think it does have a great impact on our
22 international credibility.

23 Q. Do you have any examples from your career that helped you
24 form this opinion on international credibility?

25 A. So another thing that's interesting. I talked about I had

1 been deployed to the Persian Gulf, or Arabian Gulf -- same
2 thing -- several times. And understanding cultures is also, I
3 think, something we use to our advantage.

4 Some of the missions we did while we were out there was we
5 were doing visit, board, search, and seizure where we'd go in
6 the Persian Gulf and we'd have our boarding teams go and
7 inspect for weapons, caches, and everything else. And before
8 you'd actually board those ships, you'd have to call them on
9 the radio, go through a script that was all approved and we're
10 saying we're there under the UN Security Council.

11 And understanding the culture there in that part of the
12 world, it was a very male-dominated culture. So there was a
13 couple of things that I liked to do when I was the commander
14 and officer of the USS Mason, is we knew, when you'd go on the
15 radio, and say, "This is U.S. warship," and we give our whole
16 number and start describing that and started giving them
17 instructions, if they were difficult, sometimes if they
18 weren't, it was interesting, having a mixed-gender crew, having
19 a female voice come across and saying, "This is U.S. warship
20 such-and-such. Stand by to be boarded."

21 So, culturally, it was U.S. warship, but it was also the
22 fact that these individuals were taking orders from our
23 sailors, who happen to be female. And I think it was an act of
24 dominance to say, "You're going to follow the UN rules, and
25 you're going to listen to a woman." And in your culture, you

1 may not have to do that but at sea, in international waters,
2 you're going to do that, and it's an American. But it's also a
3 little bit more impactful when some cultures had to take orders
4 from the women on the U.S. Navy warship.

5 **Q.** And that last example is the Navy using diversity
6 operationally?

7 **A.** I would say that's an example of using diversity
8 operationally because the ships that we were operating with,
9 you know, some of them had that, but it was just an interesting
10 component of U.S. Navy warship, female voice to a
11 male-dominated culture that really put the point home that
12 you're going to follow what the U.S. Navy says. And it doesn't
13 matter if the voice is male or female; it has the backing of
14 the United States. And we have full confidence in that
15 individual who's on the radio making those calls.

16 So that's pretty powerful to me that we were imposing our
17 international authority, supported by the UN, as well as the
18 United States Navy's might in international water. So it made
19 a very strong point.

20 **MR. CARMICHAEL:** I have no further questions.

21 **THE COURT:** Thank you, Mr. Carmichael.

22 Ms. Wyrick, are you doing cross-examination?

23 **MS. WYRICK:** Yes, Your Honor. We want to be
24 respectful of the admiral's time and, of course, the Court
25 staff, Ms. Thomas.

1 **THE COURT:** Would you like to break for lunch or --

2 **MS. WYRICK:** That's fine. We have less than 10
3 minutes, but we're also happy to come back.

4 **THE COURT:** Why don't you try to go ahead for 10
5 minutes. That's fine. Thank you.

6 **CROSS-EXAMINATION**

7 **BY MS. WYRICK:**

8 **Q.** Good afternoon, Admiral Fuller.

9 **A.** Good afternoon.

10 **Q.** I'm Rachael Wyrick, and I represent Students for Fair
11 Admissions. We've not met before, correct?

12 **A.** That's correct. First time.

13 **Q.** First time. Now, you've mentioned that you played
14 football for all four years at the Academy; is that right?

15 **A.** That's correct.

16 **Q.** What position? Can I ask?

17 **A.** Defensive end.

18 **Q.** And that kept you pretty busy at the Academy, I imagine?

19 **A.** I think everyone at the Academy is busy, but that did add
20 extra time to my schedule.

21 **Q.** It was extra work on top of your academic load?

22 **A.** Correct.

23 **THE COURT:** It also means he saw combat in the
24 Army-Navy game. I was going to give the admiral credit. He
25 said he hadn't seen combat. If you've been in an Army-Navy

1 game, he saw combat in the Army-Navy game.

2 (Laughter.)

3 MS. WYRICK: Absolutely, Your Honor.

4 BY MS. WYRICK:

5 Q. You would never assume, Admiral Fuller, that anyone of a
6 particular race shares the same perspective of each other; is
7 that correct?

8 A. What was the last part you said?

9 Q. I said you would never assume that anyone of a particular
10 race shares the same perspective with each other; is that
11 correct?

12 A. That's a very broad assumption.

13 Q. It is. I'm saying you would not assume that; is that
14 correct?

15 A. I'm saying that's a very broad assumption; so I'll
16 stipulate yes.

17 Q. I'll give an example. You would not assume that a White
18 man from Texas has the same perspective on the world or any
19 other issue, for that matter, as a White man from, say, New
20 York City?

21 A. So that's so broad. It depends on the subject. It could
22 be they both are Yankees fans and they do agree; it could be
23 something else.

24 So if you're just saying White man is the only thing
25 that's the difference between the two, I think every individual

1 is unique and you can't break it down to those single elements
2 as to why they would say something is different.

3 Q. Okay. Just another brief example. You would not assume a
4 Black man from New York shares the same perspective of a Black
5 man from, say, Oregon; is that correct?

6 A. Broadly speaking. I don't know the topic. So it could be
7 on specifics. It could be; it could not be.

8 Q. Okay. You know, of course, it's possible that they share
9 the same perspective?

10 A. It is possible.

11 Q. It is possible. But you would not assume that to be the
12 case based solely on their race; is that correct?

13 A. If the only thing different about them was their race --
14 or the only thing similar about them, that's a pretty broad
15 assumption there.

16 And, again, my concern is, when you have absolutes like
17 that without context, it's hard to use that single element as
18 the thing that would be your point to say they have the same
19 perspective.

20 Q. Okay. Sure. So you wouldn't assume that, because people
21 share the same perspective -- or you wouldn't assume that
22 people do share the same perspective merely because they have
23 the same race without knowing anything else about them, right?

24 A. It's too broad to make that assumption.

25 Q. Okay. You don't see a big difference between the quality

1 of officers commissioned from the Academy and those
2 commissioned through ROTC; is that correct?

3 A. So there's a difference when they first get commissioned,
4 and it's based on the experience they had. Classic example,
5 when I went to the Naval Academy, I lived in Bancroft Hall. I
6 didn't do my own laundry because it was done for me. People
7 who went to some other place had different experiences.

8 So there are fundamental -- or there's differences in
9 their experience before they start. Once they get into the
10 pipeline, they'll start normalizing over time.

11 But there are differences based on the experiences they
12 have being an Academy person versus what experience they have
13 at whatever university or commissioning source they had.

14 Q. Thanks. ROT produces officers who make it to flag; is
15 that correct?

16 A. Correct.

17 Q. Am I correct that your testimony is not based on any
18 studies that you conducted or reviewed?

19 A. Fact-based. This is my experience, not studies.

20 Q. And your testimony is not based on any surveys that you
21 conducted or reviewed; is that correct?

22 A. That's correct.

23 Q. And your testimony is not based on any interviews you
24 conducted; is that correct?

25 A. I'm a fact-based witness.

1 Q. Because you conducted no interviews related to this topic;
2 is that correct?

3 A. Correct.

4 MS. WYRICK: With that, Admiral Fuller, I'd like to
5 say thank you for your service. We're very grateful for what
6 you do.

7 No further questions, Your Honor.

8 THE COURT: The Court has a few questions.

9 Admiral, welcome, sir. And, again, thank you for your
10 service, military service.

11 THE WITNESS: Yes, sir.

12 THE COURT: I just want to ask a few questions that
13 may or may not trigger follow-up questions from counsel.

14 First of all, in terms of your rank as an admiral, as I
15 understand it, 40 percent of the flag officers, flag rank
16 officers in the Navy, are U.S. Naval Academy graduates,
17 correct?

18 THE WITNESS: That is my understanding, yes, sir.

19 THE COURT: And how many flag rank officers are there
20 in the U.S. Navy who are of color?

21 THE WITNESS: I'd say less than a dozen.

22 THE COURT: Less than a dozen.

23 THE WITNESS: That's my recollection. I don't have
24 them all memorized. But it's small.

25 THE COURT: Generally, as I understand it from

1 previous submissions by you, there's some 220 -- as of last
2 December, there were some 229 flag rank officers and about, you
3 said, 92 of them, 40 percent, are Naval Academy graduates.

4 And of those 92 -- well, actually, of the 229, you believe
5 there may be a dozen, 12, who are people of color?

6 THE WITNESS: Correct. People of color --

7 THE COURT: I understand. I understand. But the
8 point is --

9 THE WITNESS: Small.

10 THE COURT: It's been difficult, I gather, to climb up
11 through the ranks and still have diversity in the flag rank
12 corps, correct?

13 THE WITNESS: Yes, sir. Again, it's how many you
14 start with, and there's a natural attrition.

15 THE COURT: As you've noted, and there's already been
16 testimony here in court, and as I think you noted in your
17 declaration back in December, you can't cross-fertilize. You
18 can't get the CEO of General Motors and come in and make him a
19 lieutenant colonel in the Marine Corps or something. I mean,
20 they have to climb through the ranks.

21 THE WITNESS: Yes, sir, that's correct.

22 THE COURT: Even doctors and lawyers, they get direct
23 commissions perhaps as 02s or 03s, but then they still have to
24 climb through the ranks.

25 So there's difficulty in terms of diversity at that end,

1 at the higher end of the military, correct?

2 THE WITNESS: Correct.

3 THE COURT: Naval as well as Army, for that matter?

4 THE WITNESS: Correct.

5 THE COURT: So in short, in terms of the statistics we
6 have here, there hasn't been a lot of movement since World
7 War II. I think we have a study -- there were some
8 statistics -- I'll have to check my notes -- that there was
9 only one Black general in the Army after World War II and there
10 were no Black admirals after World War II.

11 And here we are, you know, 70 years later and we might
12 have 12 Black admirals in the U.S. Navy out of 230. Not a lot
13 of progress.

14 THE WITNESS: But it is progress.

15 THE COURT: No, I'm saying, but it's not -- it's not a
16 lot of progress. It's a difficult situation.

17 And the other question I have for you is that -- I think
18 Captain Latta, Dean Latta now -- and I prefer to call him
19 retired rank, Captain Latta -- or Dean Latta at the Academy has
20 previously testified that, in terms of the demographic
21 composition of the fleet, it's well over 50 percent racial and
22 ethnic minorities in the composition of the fleet. And that is
23 really -- and that's a product of a volunteer service, a
24 volunteer military.

25 So you have a disproportionate number of racial and ethnic

1 minorities at the enlisted ranks, correct, compared to the
2 overall numbers in society?

3 **THE WITNESS:** That sounds --

4 **THE COURT:** Isn't that basically correct?

5 **THE WITNESS:** Yes, sir. That sounds --

6 **THE COURT:** And, I mean, I guess the point is is that
7 you have racial and ethnic minorities that may come from urban
8 areas, and you might have younger people in rural areas who,
9 for whatever reason, aren't tracked to head for college and
10 they graduate from high school and they go in the military.

11 But the numbers clearly reflect that you have a
12 disproportionate number of racial and ethnic minorities that
13 make up the enlisted corps in the Navy, correct?

14 **THE WITNESS:** That's my understanding.

15 **THE COURT:** And that probably heightens from your
16 point of view as an Inspector General of the Navy. Now, that
17 heightens the issue with respect to trying to get some kind of
18 racial diversity in the officer corps when you have that
19 balance of the number of people who are in the enlisted corps
20 who are of color and are racial and ethnic minorities that
21 clearly is not reflected in the officer corps, correct?

22 That would be a fair statement, would it not be?

23 **THE WITNESS:** Fair statement.

24 **THE COURT:** And I'm not suggesting that there should
25 be -- 50 percent of all the admirals in the U.S. Navy should be

1 Black or of color, but I'm just saying that there is that
2 dynamic that the Navy has to deal with in terms of the reality
3 of a volunteer force here in the 21st century, correct?

4 **THE WITNESS:** Yes, Your Honor. And I wanted to say
5 I'm not advocating any type of quota system.

6 **THE COURT:** No, no. I'm not advocating a quota
7 either. I'm just talking about that the underlying reality
8 here, when all is said and done, is that you have a
9 volunteer -- and this may be true as to the Navy -- I mean, to
10 the Army and to the Air Force, but you clearly have a situation
11 where you have a volunteer force --

12 Off the record, I would like to know how many law students
13 over at the University of Maryland Law School have any
14 connection with the military. I suspect not many. They're
15 walking off the -- it might be zero, but I suspect not many.

16 And so you have a reality of that disproportion that the
17 military has to deal with and certainly the Navy has to deal
18 with in terms of the numbers in terms of the issue of some type
19 of diversity in the officer corps to deal with this imbalance.

20 That's a fair statement, isn't it?

21 **THE WITNESS:** Yes, Your Honor.

22 **THE COURT:** All right. I have no further questions.

23 Any further questions from the point of view of counsel on
24 that?

25 Mr. Carmichael, anything further on this from your point

1 of view?

2 **MR. CARMICHAEL:** No, Your Honor.

3 **THE COURT:** Ms. Wyrick, anything further from your
4 point of view?

5 **MS. WYRICK:** No, Your Honor.

6 **THE COURT:** All right. Thank you, Admiral Fuller, and
7 thank you for your service.

8 **THE WITNESS:** Thank you, Your Honor.

9 **THE COURT:** And I'm glad we got you finished. You can
10 head back to Washington. And traffic around this area, you
11 might make it back in a couple hours from here to Washington.
12 At least put a flag on your car and maybe you can run through
13 the traffic. We'll see.

14 But thank you very much, sir.

15 This Court stands adjourned for an hour.

16 **THE CLERK:** All rise. This Honorable Court stands
17 adjourned.

18 (A recess was taken from 1:07 p.m. to 2:11 p.m.)

19 **THE COURT:** Good afternoon, everyone. You all may be
20 seated.

21 For reasons I can't go into really, but just in terms of
22 scheduling, we're going to start tomorrow -- you'll understand
23 later, but we're going to start tomorrow at 11:00 and not 10:00
24 tomorrow.

25 So to the extent you're fighting Washington traffic coming

1 up, you can perhaps avoid it this one time. But anyway, we're
2 going to start at 11:00. I don't think it will affect the
3 scheduling too much, but for a lot of reasons I can't go into
4 now on a courthouse matter, we're going to have to start at
5 11:00 and not at 10:00 tomorrow.

6 So, with that, I think we are ready here for Dr. Gurrea,
7 if I'm pronouncing his name correctly. Gurrea?

8 Ms. Herndon, if you'll swear the witness, please.

9 **THE CLERK:** Yes.

10 Please raise your right hand.

11 (Witness sworn.)

12 **THE CLERK:** Please state and spell your first and last
13 name for the record.

14 **THE WITNESS:** First name, Stuart, S-T-U-A-R-T; last
15 name, Gurrea, G-U-R-R-E-A.

16 **THE CLERK:** Thank you.

17 **THE COURT:** You may proceed, Mr. Gardner.

18 **MR. GARDNER:** Thank you, Your Honor.

19 **DIRECT EXAMINATION**

20 - - -

21 **BY MR. GARDNER:**

22 **Q.** Good afternoon, Dr. Gurrea.

23 **A.** Good afternoon.

24 **Q.** Where do you work?

25 **A.** At an economics consultancy called Secretariat.

1 Q. How long have you been with Secretariat?

2 A. I've been with Secretariat for over 20 years.

3 Q. And what is your title at Secretariat?

4 A. Managing director.

5 Q. Where did you attend college?

6 A. I completed my undergraduate studies at the University of
7 Seville in Spain.

8 Q. And what degree did you receive from that university?

9 A. Equivalent to a --

10 THE COURT: For some reason -- I don't know why -- but
11 at least from my -- I'm not sure if it's affecting Ms. Thomas.
12 We have a tunnel effect on that microphone. I mean, it is not
13 coming through well. Everything is clear as a bell. I don't
14 know if he's too close to the microphone or what it is, but --

15 THE WITNESS: Is this better?

16 THE COURT: I don't know for Ms. Thomas's purposes,
17 but I can tell you, it's a tunnel effect. I'm having trouble
18 hearing him.

19 So pull back from the microphone perhaps to see if that's
20 better.

21 Ms. Herndon, if you can improve that a little bit.

22 You're clear as a bell, Mr. Gardner. He's just, like, in
23 a tunnel. It's sort of an echo. It's just not -- let's wait
24 one second here.

25 THE CLERK: Your Honor, he just has to move back from

1 the mic.

2 **THE COURT:** Okay. That's fine.

3 All right. Thank you. Sorry to interrupt you, Doctor.

4 **BY MR. GARDNER:**

5 **Q.** I think I asked you what degree you received.

6 **A.** Yes, the equivalent to a bachelor's degree in economics.

7 **Q.** And what did you do after college?

8 **A.** I joined Secretariat.

9 **Q.** Did you attend graduate school?

10 **A.** Yes. Right after my undergraduate studies, I attended
11 graduate school at Northwestern University. I was awarded a
12 scholarship to pursue graduate studies at Northwestern.

13 **Q.** What degrees did you receive from Northwestern?

14 **A.** A master's degree in economics and a doctoral degree, a
15 PhD, in economics.

16 **Q.** As part of your doctoral studies, did you specialize in
17 any fields of study?

18 **A.** Yes, three fields of study -- financial economics,
19 industrial organization, and econometrics.

20 **Q.** What's econometrics?

21 **A.** Econometrics is the application of mathematics and
22 statistics to the analysis of economic data.

23 **Q.** What is industrial organization?

24 **A.** Industrial organization studies the operation of markets
25 and decision makers by consumers -- excuse me --

1 decision-making by consumers and organizations.

2 Q. Is industrial organization related to econometrics?

3 A. Yes, closely related in the sense that econometrics is the
4 primary analytical tool that is employed in the field of
5 industrial organization to analyze and interpret data.

6 Q. Dr. Gurrea, did you take any graduate courses in
7 econometrics that are relevant to the opinions that you're
8 offering today?

9 A. Yes. As part of my doctoral studies, the first year in
10 graduate school there was a full course requirement of
11 completing a sequence in econometrics. I also pursued and
12 completed some more advanced courses in econometrics. And also
13 as part of a variety of field studies, econometrics was the
14 main tool employed in those courses.

15 Q. Is there one specific econometric model that is central to
16 the analysis in this case?

17 A. Yes, the logit model.

18 Q. And is it a logit module with binary outcomes?

19 A. Yes. Specifically in this case, the logit model that is
20 being used is a model with binary outcomes.

21 Q. So let's back up a step. What is a logit model?

22 A. A logit model is an econometric model that predicts
23 probabilities based on the analysis of decisions and the
24 frequency of alternative decisions as explained by a variety of
25 observable variables.

1 Q. What is a logit model with binary outcomes?

2 A. It's the most simple version of a logit model in which the
3 observed outcome is a binary outcome, meaning that there are
4 two alternatives. For example, in this case it's about
5 acceptance and rejection.

6 Q. Was the study of this model part of the graduate economics
7 curriculum at Northwestern?

8 A. Yes. As part of the required sequence in econometrics,
9 logit model was one of the initial models that was analyzed.

10 Q. To your knowledge, is the logit model commonly studied in
11 economics?

12 A. Yes. It's one of the most basic and commonly used, I
13 would say the most commonly used discrete choice model.

14 Q. What's a discrete choice?

15 A. A discrete choice, as opposed to a model that has
16 continuous or unlimited outcomes, it's a model that has limited
17 outcomes. For example, in a binary case it means that the
18 outcomes are just one or two; there's no three or four
19 alternatives.

20 Q. Would you regard the logit model as the easiest discrete
21 choice model?

22 A. Yes. It's the most straightforward one and -- relatively,
23 of course, in terms of the underlying mathematics.

24 Q. Why is the logit model so popular with economists?

25 A. I think one reason perhaps is the relatively -- the

1 relative simplicity in terms of its underlying mathematics.

2 Also, it's been around for a while now. It was popularized

3 about 40, 50 years ago by work by a Nobel laureate. And

4 probably a third reason is that it's easily implemented because

5 it's incorporated in most statistical packages.

6 Q. Statistical packages meaning software packages?

7 A. Yes, exactly.

8 Q. Was any of your academic background in econometrics

9 particularly necessary to form your opinions in this case?

10 A. Yes. I think generally my studies in econometrics were

11 relevant in terms of assessing the use of econometric models in

12 general, specification issues in terms of the inclusion of

13 variables, the functional form, and specifically the adoption

14 and use of the logit model in this case. And that's a standard

15 practice in the use of econometrics in general.

16 Q. Can you give me an example of the work in graduate school

17 that you were involved in in terms of developing a discrete

18 choice model?

19 A. Yes. For example, my doctoral dissertation involved

20 discrete choices made by airlines. In that case, it was about

21 entering or not entering a certain market. So in the sense it

22 was a very familiar framework conceptually in terms of

23 decision-making, but it was in a different setting.

24 Q. And then to develop the economic model that was the focus

25 of your graduate school thesis, did you assess whether the

1 economic decisions you modeled met the assumptions of the
2 model?

3 A. Yes. So that's, I think, one of the first steps that you
4 need to -- to complete is to understand exactly what are you
5 modeling, what is the reality and the facts that are modeling,
6 and then determine whether the assumptions that are embedded in
7 the model conform with the reality that you're trying to model.

8 Q. Did you publish your dissertation?

9 A. Yes, I did.

10 Q. Where?

11 A. In a handbook in airline economics which is a publication
12 that compiled cutting-edge research into explaining behavior in
13 that industry.

14 Q. I want to turn now to your professional experience. After
15 graduating from Northwestern, what did you do next?

16 A. I joined the Secretariat predecessor, which is -- was
17 Economists Incorporated.

18 Q. And what year was that?

19 A. That was in 2001.

20 Q. Have you been employed full time at Secretariat or its
21 predecessor since 2001?

22 A. Yes.

23 Q. You're not an academic, correct?

24 A. No.

25 Q. Do you still conduct econometric analysis as a consultant?

1 A. Yes. My primary work is applied microeconomic analysis in
2 a variety of contexts. And as an economist, a fundamental part
3 of my work is data analysis. Unlike academic work, my focus is
4 always on real-world problems and the use of econometrics is
5 necessary because it's the primary tool that economists employ
6 to analyze economic data.

7 Q. I heard you use the term "applied economic research."
8 What does applied economic research mean?

9 A. Rather than focusing on theoretical modeling, it's
10 directly connected to the analysis of data.

11 Q. Can you give the Court a sense of some of the types of
12 clients you've worked for over the past 20 years as an
13 economist.

14 A. Yes. So it's varied a lot. And it has included
15 government organizations, nonprofits. Some of this work is
16 conducted in the context of regulation; other times, it's in
17 legal disputes, and our clients are lawyers.

18 Q. Can you tell me some of the sectors -- business sectors
19 that you've worked in over the past 20 years.

20 A. It's an extraordinarily broad range, including
21 telecommunications and energy sector, pharmaceuticals, consumer
22 goods, the education industry.

23 Q. You just mentioned several different industries to
24 describe your consulting assignments. Did you have any direct
25 experience working in those various industries?

1 A. No.

2 Q. How were you then able to complete an economic analysis of
3 these industries if you had no direct experience working in
4 those industries?

5 A. By initially familiarizing myself with the institutional
6 background and the specifics of that industry. And I did
7 that -- and I have done that -- by interviewing officials,
8 decision-makers, industry participants, by gathering private
9 data, by collecting public data, by reviewing documents.

10 Q. Do you have any previous experience working in college
11 admissions?

12 A. No.

13 Q. Do you have any previous experience working -- strike
14 that.

15 How does that lack of direct experience in college
16 admissions affect your ability to provide expert testimony in
17 this case?

18 A. It did not.

19 Q. Why not?

20 A. Because I followed the same steps that I followed and
21 adopted in all of my prior work as an economist.

22 I, first of all, spoke with the decision-makers that were
23 the most knowledgeable about the question that I was about to
24 model. In this case, I had the opportunity to visit the U.S.
25 Naval Academy to speak with officials responsible for the

1 admissions process, including Dean Latta and Melody Hwang.

2 I also spoke with other people responsible for the
3 process. Members of my team over time have continued to
4 communicate with people responsible at the U.S. Naval Academy
5 under my direction to gather further information and address
6 and ask questions. And then I have relied on my review of
7 documents produced in this case, public documents, and
8 textbooks and journals in economics.

9 Q. How many cases have you worked on over the course of your
10 20-year career as an economist?

11 A. I would say about 100.

12 Q. In your role as a testifying expert, have you submitted
13 testimony related to econometric modeling?

14 A. Yes.

15 Q. Is your prior testimony as a testifying expert relevant to
16 forming your opinions in this case?

17 A. Yes.

18 Q. How?

19 A. Because it gave me experience in applying econometric
20 methods, assessing the suitability of econometric models,
21 assessing the implementation, the estimation and the
22 interpretation of results derived from econometric models.

23 Q. Have you ever testified about logit models with binary
24 outcomes before?

25 A. No.

1 Q. Outside of your role as a testifying expert, have you
2 completed expert analysis specifically using a logit model?

3 A. Yes. As I said, econometrics in general, it's the primary
4 tool that economists employ. And, specifically, I have used
5 logit models in my prior work as an economic consultant in
6 addressing and modeling decision-making.

7 Q. Did any of that prior experience working with logit models
8 inform your opinions in this case?

9 A. Yes. It gave me the experience in and familiarity with
10 the use of the model, with the implementation, with
11 understanding the underlying assumptions of the modeling
12 framework and to interpret the implementation and the
13 estimation and the results of the model.

14 Q. From a modeling perspective, how do those previous models
15 that you worked on in unrelated litigation differ from the
16 model the plaintiff has put forward in this case?

17 A. Yes. Some of those cases involved modeling decisions with
18 many more alternatives. And in a sense, the binary logit model
19 that is the central model in this case is a more simple version
20 of some of those models that I used in prior work.

21 Q. Dr. Gurrea, have you ever testified in a legal proceeding
22 before?

23 A. Yes, I have.

24 Q. How many times?

25 A. I'd say more than a dozen.

1 Q. Have you been qualified as an expert in federal court?

2 A. Yes.

3 Q. How many times?

4 A. I think approximately five or six. I can't remember
5 exactly.

6 Q. In which courts?

7 A. In federal district court in California, federal district
8 court in Maryland in the Greenbelt division, and in the Court
9 of Federal Claims.

10 Q. In what areas have you been qualified as an expert?

11 A. In economics, economic modeling, the analysis of economic
12 and survey data, and impact evaluation.

13 Q. Has any court not qualified you as an expert?

14 A. No.

15 Q. Over the course of your professional career, have you
16 performed work for the federal government?

17 A. Yes, I have.

18 Q. Has all of your litigation consulting work been done on
19 behalf of the government?

20 A. No. It has varied over time. I would say over the last
21 six months, this case has been my primary focus. But I would
22 say overall less than half of my work during my professional
23 career.

24 Q. Are you a member of any professional associations?

25 A. Yes, the American Economic Association and the American

1 Finance Association.

2 Q. Dr. Gurrea, did the Department of Justice retain you to
3 offer opinions in this case?

4 A. Yes.

5 Q. What was the scope of your assignment?

6 A. To assess the analysis presented by Professor Arcidiacono.

7 Q. What methodology did you employ in your analysis in this
8 case?

9 A. I scrutinized Professor Arcidiacono's model results,
10 implementation of his estimation methods, and presentation of
11 results under the -- or following the generally accepted
12 principles in economics.

13 Q. Are the methods that you employed in this case widely used
14 by other economists in the field?

15 A. Yes. I would say that most of the work that I have done
16 has been subject to this type of methodology.

17 MR. GARDNER: Your Honor, at this time I move to have
18 Dr. Gurrea qualified as an expert witness in economics and
19 econometric modeling.

20 THE COURT: Yes.

21 Any voir dire, Mr. Mortara?

22 MR. MORTARA: No.

23 THE COURT: He will be accepted as an expert in those
24 fields and be permitted to testify as such.

25 Thank you, Doctor.

1 **MR. GARDNER:** Thank you, Your Honor.

2 **BY MR. GARDNER:**

3 **Q.** Dr. Gurrea, I want to put on the screen what has been
4 marked as DX -- or Defendant's Exhibit -- 200.

5 Did you prepare an expert report in this case?

6 **A.** Yes, I did.

7 **Q.** Do you recognize what has been marked as DX200 as your
8 expert report?

9 **A.** Yes, I do.

10 **MR. GARDNER:** Your Honor, I think it's already
11 admitted.

12 **THE COURT:** Yes. Absolutely.

13 **MR. GARDNER:** Got it.

14 **BY MR. GARDNER:**

15 **Q.** Dr. Gurrea, do you have demonstrative exhibits or slides
16 that you've prepared to help accompany your testimony today?

17 **A.** Yes, I do.

18 **Q.** Is that what is on the screen right now?

19 **A.** Yes.

20 **MR. GARDNER:** Your Honor, I understand that your
21 preference would be to actually admit these. So --

22 **THE COURT:** Yes.

23 **MR. GARDNER:** -- we would move for the admission of
24 what has been marked DD5 --

25 **THE COURT:** Yeah, all these -- all these

1 demonstratives as to which there's been testimony are in
2 evidence as well on both sides.

3 **MR. GARDNER:** Yep.

4 **THE COURT:** There were no objections from either side.
5 And it will be easier for me to review all the materials in
6 preparing my opinion. So thank you.

7 **MR. GARDNER:** You're welcome.

8 **BY MR. GARDNER:**

9 **Q.** Dr. Gurrea, before we get into your opinions, could you
10 remind the Court as to what Professor Arcidiacono's opinions
11 are in this case.

12 **A.** Yes. As I understand, Professor Arcidiacono's opinions
13 relate to assessing the impact of the U.S. Naval Academy's
14 consideration of race on admissions decisions. To that end,
15 Professor Arcidiacono has developed an econometric model that
16 relies on a dataset that he created. He acknowledges that that
17 dataset contains a subset of all the relevant information that
18 the Academy considers.

19 And based on the estimates that he derives from that
20 limited set of data, he concluded that the Academy gives a
21 significant amount of weight to the consideration of race when
22 making their admissions decisions.

23 **Q.** With that framework in mind, Dr. Gurrea, let's turn to a
24 summary of your opinions.

25 Why don't we start with Slide 1. It's actually DD5.2.

1 What is your first opinion in this case?

2 A. Yes. My first opinion concerns the size of the estimates
3 of Professor Arcidiacono. Specifically, the question that he's
4 trying to address is what's the impact of the Academy's
5 consideration of race?

6 And my first opinion is that the magnitude of the
7 coefficient, that quantification that Professor Arcidiacono is
8 submitting to the Court, is biased.

9 Q. What do you mean when you say that it's biased?

10 A. So literally that the coefficient that he's estimating is
11 not an accurate measurement of the effect that he's trying to
12 measure.

13 So in this case he's trying to measure the impact of the
14 consideration of race. He derives a coefficient. And that
15 coefficient, I think, by Professor Arcidiacono's own admission,
16 is not an accurate measure. It's actually biased.

17 Q. So why do you believe, then, that Professor Arcidiacono's
18 estimates are biased?

19 A. Because there's a significant amount of information that
20 he did not consider. And when that information is correlated
21 with race, the coefficient that you observe cannot be solely
22 attributed to race, but it's also attributable to all these
23 other pieces of information that are correlated with race.

24 Q. Let me just back up a step.

25 So if you believe that his estimate of the impact of race

1 is biased, do you believe it's larger or smaller than the
2 actual contribution of race to the Academy's admissions
3 decisions?

4 A. I think Professor Arcidiacono's estimate overstates the
5 impact.

6 Q. Do you believe that his estimate of the contribution of
7 race to the Academy's admissions decision is overstated?

8 A. Yes.

9 Q. Why?

10 A. Because he has failed to account for information that is a
11 strength for minority candidates, and that results in a
12 misattribution of the effect that he quantifies to the
13 consideration of race by the Academy.

14 Q. We'll unpack that in a little more detail, but why don't
15 we turn to your second opinion.

16 And what is your second opinion in this case?

17 A. This is more of a technical and methodological opinion.
18 And this is an opinion that relates specifically to the
19 adoption of the logit model in this case.

20 The model assumes that decisions are independent. And in
21 this case I think that the underlying assumption does not
22 conform with the actual process; and therefore, the statistical
23 results that Professor Arcidiacono derives from the model are
24 unreliable.

25 Q. We'll obviously talk much more about that opinion as well.

1 But for now, why don't we turn to your third opinion in
2 this case. And what's that?

3 A. Yes, this is sort of also more of a methodological
4 objection. My opinion -- my third opinion concerns Professor
5 Arcidiacono's categorization of race and ethnicity.

6 Professor Arcidiacono eliminated the distinction between
7 race and ethnicity, and he also arbitrarily assigned applicants
8 that identified as multiracial to single races. And what I
9 find is that the predictions of his model are sensitive to the
10 way that he goes about categorizing race and ethnicity.

11 Q. Why don't we now turn to your fourth opinion. And can you
12 please describe at a high level what your fourth opinion is.

13 A. Yes. This concerns the interpretation of Professor
14 Arcidiacono's results. I think that one thing that is
15 important to keep into perspective in this case is that a large
16 majority of applicants are White and that minorities represent
17 a relatively small group.

18 I understand that there's been some characterization of
19 this process as being a zero-sum game, but I think it's
20 important to keep in mind this distinction and that -- and
21 because of the large disparity in the numbers of applicants
22 across races, any impact that Black applicants have in their
23 application process would have a relatively small impact on
24 individual White applicants.

25 Q. We'll unpack that as well in a few more minutes. But,

1 first, what's your fifth opinion?

2 A. My fifth opinion also relates to the presentation and
3 description of Professor Arcidiacono's empirical result. And I
4 find the description of Professor Arcidiacono's counterfactual
5 world where he hypothesizes what class composition would look
6 like in the absence of the consideration of race as incomplete
7 and misleading.

8 Q. And then what is your final opinion?

9 A. My final opinion concerns the idea of racial balancing and
10 whether there's stability in the racial composition of classes
11 over time. And I don't find that Professor Arcidiacono
12 provides any empirical evidence. And, in fact, the actual data
13 contradicts the idea that there's some stability in the
14 enrollment across racial groups.

15 Q. Dr. Gurrea, let's now do a deeper dive into each of these
16 six opinions. Let's start with the very first one. And,
17 again, if you can just remind the Court of what your first
18 opinion is.

19 A. Yes. My first opinion relates to the actual estimation of
20 the impact of the consideration of race and ethnicity on the
21 admissions process at the Naval Academy.

22 Q. As a preliminary matter, does Professor Arcidiacono find
23 Black and Hispanic applicants that are non-BCA and nonplebe get
24 into the Academy at noticeably higher rates than White
25 applicants?

1 A. No. As you can see in this chart across these three
2 racial groups, admission rates are very similar.

3 Q. Did you do anything to independently estimate the
4 admissions rates at the Academy?

5 A. Yes. I compiled admissions data and sort of replicated
6 the same kind of analysis and obtained very similar results.

7 Q. So you agree with his estimation that the admission rates
8 for White and Black candidates are roughly comparable?

9 A. Yes, that's correct.

10 Q. So if you agree with him that admission rates are
11 generally the same, what's the main disagreement that you have
12 with his opinion?

13 A. My disagreement concerns the interpretation of the
14 coefficient in Professor Arcidiacono's model. As I said, this
15 coefficient accounts for race and everything that's not
16 explicitly modeled that is correlated with race. So it's an
17 issue of interpreting the coefficient and attributing that
18 effect to the Academy or to something else.

19 Q. And just because it's been almost a week since we've heard
20 economic testimony, can you just remind the Court again what a
21 coefficient is?

22 A. The coefficient is the numeric estimate of the impact of a
23 variable on what we are trying to explain, in this case, the
24 probability of admission.

25 Q. Is the concern that you just expressed reflected on what

1 is DD5.10 of your demonstratives?

2 A. Yes. So this is an illustration of that point. So on the
3 left-hand side, there's a blue bar, and that reports the
4 admission rate for White candidates. And that's 36.11 percent.
5 On the right, it's the similar bar for Black candidates, and
6 that's 37.28 percent.

7 According to Professor Arcidiacono, almost two-thirds of
8 that admission rate can be attributed to the consideration of
9 race and only about a third is directly attributable to the
10 strength of, in this case, Black applicants.

11 Q. Let me take one step back. Do you agree with Professor
12 Arcidiacono that the Academy considers race in the admissions
13 process?

14 A. Yes, I've heard Dean Latta's testimony to that effect.

15 Q. So what about his opinion do you disagree with?

16 A. My opinion is different in terms of interpretation of what
17 is that estimate? What's that coefficient? What does it mean?
18 And to what extent the Academy considers race in its
19 decision-making.

20 Q. And what is your view?

21 A. My view is that it's overstated.

22 Q. Did Professor Arcidiacono testify that the model fits the
23 data well?

24 A. Yes. Professor Arcidiacono highlighted that his model fit
25 very well the data.

1 Q. Given that testimony, then how could it be possible that
2 his model fails to account for certain factors?

3 A. Because how well the model fits the data doesn't tell us
4 anything about whether there is bias or not. And you can see
5 it here in the chart on the right.

6 So there is, again, as in the prior chart, the blue bar
7 shows that still there's a small amount, relatively small
8 amount, that can be explained by the strength of Black
9 applicants' applications, as observed in Professor
10 Arcidiacono's dataset.

11 But there's -- the portion that Professor Arcidiacono
12 attributes to the racial consideration is actually, in part,
13 explained by other attributes of Black applicants that are just
14 simply not observed in his data.

15 Q. Let's take a step back again. What's the difference
16 between fit and bias?

17 A. So fit is how well the model explains the outcomes. So in
18 this case Professor Arcidiacono has collected data, and his
19 model does a fairly good job of explaining decisions.

20 But bias concerns the interpretation of the coefficients
21 and whether there's actually an issue of whether simply we're
22 observing some correlation or whether there's an actual
23 underlying causal relation.

24 So in this case there's a correlation with the
25 coefficients, with the observed outcome. So that means that

1 the model is doing a good job. But simply because there's that
2 correlation and we observe the inclusion of a race variable
3 explains well in the outcome doesn't mean that that race
4 variable is entirely attributable to the Academy's
5 consideration of race.

6 But anything else that is not in the model that is not
7 accounted for in Professor Arcidiacono's dataset would capture
8 some of that effect.

9 Q. Let's dig into that a little bit, and maybe we can
10 illustrate.

11 If we can go to the next slide.

12 Why do you believe that Professor Arcidiacono's estimate
13 of the Academy's consideration of race is biased?

14 A. Because the Academy considers lots of information, and the
15 dataset that Professor Arcidiacono constructed only reflects a
16 subset of that information. It's likely that some of that
17 information was correlated with race; and therefore, the
18 estimate that Professor Arcidiacono is deriving is a mix of
19 both the contribution of the Academy's consideration of race
20 and anything else that he did not put into the model that is
21 also correlated with race.

22 Q. Is there a term of art in economics for this problem?

23 A. Yes. It's called omitted variable bias.

24 Q. Let's look at the next slide.

25 Now, you indicated that the sources of this bias or

1 factors that Professor Arcidiacono did not consider that are
2 correlated with race; is that right?

3 A. Yes, that's correct.

4 Q. How could these unaccounted-for factors contribute to an
5 admission decision if they're not in his data?

6 A. Again, because Professor Arcidiacono's model is entirely
7 reliant on information that can be codified and incorporated
8 into a dataset and is amenable to statistical analysis.

9 The Academy decides on admissions based on a broader set
10 of information. The information that Professor Arcidiacono
11 considered is relevant to the admissions process, but it's only
12 a subset of that information.

13 Q. Let's get really specific. What kind of information are
14 we talking about?

15 A. A broad set of information contained in letters of
16 recommendation, interview notes, personal statements. For
17 example, I heard last week Dean Latta describe the significance
18 of letters of recommendation in making admissions decisions.

19 This specific excerpt highlights the importance of
20 recommendation letters in characterizing the socioeconomic
21 condition of an applicant.

22 Q. I think you said that this information or these sources of
23 information are relevant to admissions decisions at the Naval
24 Academy?

25 A. Yes.

1 Q. Did Professor Arcidiacono agree that he did not review
2 this information?

3 A. Yes.

4 Q. And is that what's reflected in Slide 14?

5 A. Yes. So you went over a detailed list of different
6 sources of information like the ones that I just described, and
7 Professor Arcidiacono acknowledged that he did not apply a
8 statistical model to analyze these sources of information.

9 Q. So if he agrees with you that there is information that he
10 did not review or observe in his data that contributes to
11 admissions decisions, does he think this information likely has
12 an impact on his estimates of the consideration of race by the
13 Naval Academy?

14 A. Yes. Professor Arcidiacono and myself are in agreement
15 that, because he does not observe this information, his
16 coefficient estimates are biased.

17 Q. Let's look at the next slide, Slide 15.

18 How do you know that he agrees that his estimates are
19 biased?

20 A. This is an excerpt from the table of contents of Professor
21 Arcidiacono's report, and there's a full section dedicated to
22 this topic. And the heading of that section is "My Estimates
23 of the Magnitude of Racial Preferences Are Likely Understated."

24 And that means that, in his view, the estimates that he is
25 reporting are not an accurate measure of the magnitude of

1 racial preferences.

2 Q. So if both you and Professor Arcidiacono agree that his
3 analysis omits relevant information that the Academy considers
4 and that these omissions likely bias his estimate of the impact
5 of the Academy's consideration of race, then what is your
6 disagreement about?

7 A. Our disagreement is in sort of the direction of the bias.

8 In Professor Arcidiacono's view, the bias has the effect
9 of understating the true impact, and in my view it's the
10 opposite. I believe that the measure that Professor
11 Arcidiacono is estimating is actually overstating the impact.

12 Q. Why don't we look at the next slide, Slide 16.

13 What's being reflected on Slide 16?

14 A. This is the basis for Professor Arcidiacono's conclusion
15 that the effect of the bias is to understate the impact.

16 So I think this is a critical piece of information because
17 Professor Arcidiacono's estimates are constrained by the
18 information that's incorporated into his model. His model has
19 the limitation, and the strength of his predictions are as good
20 as the richness of his data. And because that data is
21 incomplete, he acknowledges that the information -- the
22 estimate that he reports is biased.

23 So that's our starting point, is the implementation of a
24 model that gives us an estimate that is not an accurate measure
25 of what we're trying to measure. And all the sophisticated

1 analytical framework that Professor Arcidiacono implements can
2 only get us this far, is to end up with an estimate that, by
3 his own admission, is biased.

4 Now, the next question is is this an understated estimate
5 or an overstated? In his -- he believes that it's -- that the
6 estimate that he is reporting is understated, and the basis for
7 that is an assumption, an assumption where he says that
8 applicants who are strong on what we observe are likely to also
9 be strong on the characteristics that we do not observe.

10 **Q.** Let's take this one piece at a time.

11 And let's go to Slide 17.

12 I think you've generally already discussed this, but let
13 me just -- so we have a clear record, why is the question about
14 bias so important here?

15 **A.** Because, as I said, the coefficient estimate that this
16 sophisticated model generates is biased. It's not an accurate
17 measure. What we end up with is having to reach a conclusion
18 about the impact of the bias. And by Professor Arcidiacono's
19 own admission, this bias could be such that the entire impact
20 that he estimates could go away.

21 **Q.** But Dr. Gurrea, why don't you answer this question by
22 empirically testing the correlation between the race variable
23 and the unobservables?

24 **A.** Because by definition, these unobservables contain
25 information that's not amenable to statistical analysis,

1 therefore, cannot be subject to rigorous statistical testing.

2 Q. Does Professor Arcidiacono share your view that this
3 correlation cannot be tested?

4 A. Yes.

5 Q. Is that what's reflected here in demonstrative Slide 17?

6 A. Yes. When you asked him if there's no real way to test
7 this assumption, he agreed. And that was just by definition.

8 Q. So I think you've already said this, but just so, again,
9 we have a clear record, if this assumption cannot be tested,
10 what is, then, the basis that he provides for his assumption
11 that his estimates are conservative?

12 A. It's just an assumption.

13 Q. Let's look at Slide 18. What's the basis for that
14 assumption?

15 A. Professor Arcidiacono relied or at least cited to a work
16 published in the Journal of Political Economy by Professor
17 Altonji, coauthored with Christopher Taylor and Todd Elder
18 while they were at Northwestern.

19 Literally, that article explicitly says that they make the
20 assumption that, if someone is stronger on observable
21 characteristics, they are going to assume in that work that
22 they are also stronger, relatively stronger, in the
23 unobservable characteristics.

24 Q. So do you have a view as to whether the study that
25 Professor Arcidiacono relies on justifies making the

1 assumptions that he made in this case?

2 A. No. The study that he relies on explicitly has a
3 cautionary note that at the end it says that it's dangerous to
4 infer too much about selection on unobservables, from selection
5 on the observables, if the observables are likely to be
6 representative of the full range of factors.

7 Q. Dr. Gurrea, could you provide an example about how to
8 assess the validity of this assumption he makes?

9 A. Yes. So this cautionary note is a very intuitive point.
10 Assume that you have a candidate and you can observe their SAT
11 score, and suppose you can observe that information from all
12 candidates, and suppose that for one ethnic racial group, they
13 have higher SAT scores. So you concluded that this ethnic
14 group, based on the observables, are stronger candidates.

15 Now, there's another set of information. Suppose you do
16 not observe their socioeconomic characteristics. How could you
17 possibly know if there are any racial differences in terms of
18 socioeconomics strictly based on their SAT scores? It makes no
19 sense.

20 Now, it would make sense if, for example, you are thinking
21 about SAT scores that you observe and you do not observe high
22 school grades. It may be in that context in which the
23 unobservable is within the range of the type of information
24 that you actually get to observe that they may be similar and
25 an ethnic group that has higher SAT scores in math may have

1 higher high school grades.

2 So that makes sense, and that's sort of the assumption
3 that Professor Altonji makes. But he cautions that, if what
4 you don't observe is beyond the range of what you observe, then
5 there's no real basis to make that assumption.

6 Q. Let's go to Slide 19.

7 Dr. Gurrea, does Professor Arcidiacono attempt to prove
8 that his assumption about data that he does not account for is
9 reliable?

10 A. Yes. Professor Arcidiacono also takes an empirical
11 approach to test this. And what he does is he gradually
12 incorporates observable information into his model. And I want
13 to highlight. It's just an additional observable information.

14 In this case, he finds that the coefficient on Black
15 increases gradually as more information is included so what he
16 concludes is that, as you account for more information, the
17 application filed for Black candidates is actually weaker; and
18 to maintain the same observed outcome, it must be that the role
19 of the consideration of race increases. And, therefore, just
20 strictly based on the analysis of information that he observed,
21 he concludes that this corroborates his assumption.

22 Q. Let's turn to Slide 20.

23 Dr. Gurrea, do you find that his approach here is
24 reliable?

25 A. No. Professor Arcidiacono cited this article, and this

1 article again adds a cautionary note and says, "A common
2 approach to evaluating robustness to admitted variable bias is
3 to observe coefficient movement after inclusion of controls."

4 So this article acknowledges that what Professor
5 Arcidiacono did is a common approach, but it cautions the
6 economist to make sure that -- to keep in mind that this is
7 only informative if the selection of observables is informative
8 about the selection of unobservables.

9 Again, that makes a lot of intuitive sense. So if I know
10 your math SAT scores, I think it's a reasonable assumption to
11 say that I know something about probably your high school math
12 grades. But if I know something about your math SAT score,
13 it's very unreasonable to assume that I know something about
14 your socioeconomic condition.

15 Q. And just so we have a record, the article that you're
16 referring to is the article referenced on Slide 20 by Emily
17 Oster?

18 A. Yes, that's correct.

19 Q. Let's look at the next slide.

20 Dr. Gurrea, can you provide an example of the source of
21 bias that likely results in Professor Arcidiacono's estimates
22 overstating the impact of the Academy's consideration of race?

23 A. Yes. I picked the example of socioeconomic disadvantage.

24 So when we think about a possible source of bias, the
25 first thing we need to think about is whether there's some

1 differences in that variable across racial groups. And based
2 on my review of a variety of studies produced by the Bureau of
3 Labor Statistics and the Federal Reserve, I find that,
4 systematically, they report an economic disadvantage for Blacks
5 in America. And that can be found in terms of their income, in
6 terms of homeownership, and in terms of access to employer
7 retirement plans, among many other economic metrics.

8 This is not a controversial opinion. Professor
9 Arcidiacono actually more specifically notes that Black
10 applicants are more likely to come from more socioeconomically
11 disadvantaged households. And Mr. Kahlenberg also concurs with
12 this opinion, noting that Black and Hispanic Americans, on
13 average, have lower incomes than White Americans, live in
14 neighborhoods with higher concentrations of poverty; they have
15 lower levels of wealth; and they're more likely to grow up in
16 single-parent households.

17 Q. Let's go to the next slide.

18 What is the basis, Dr. Gurrea, for the view that
19 socioeconomic disadvantage is considered a positive for
20 admissions decisions by the Naval Academy?

21 A. Yes. So this is something that the Academy takes into
22 account positively. I heard the testimony from Dean Latta to
23 this effect and that the Academy is seeking out applicants from
24 lower incomes.

25 Q. Let's go to the next slide.

1 What's reflected on Slide 23?

2 A. This is just an excerpt of admissions guidelines, and it
3 also identifies specifically income as -- low family income as
4 a factor to seek out in the admissions process.

5 Q. So I think you've already testified to this, but just to
6 be clear, does Professor Arcidiacono agree with you that Black
7 Americans face adverse socioeconomic circumstances?

8 A. Yes, he does.

9 Q. And I think you testified that Mr. Kahlenberg also agrees
10 with you that Black Americans face adverse socioeconomic
11 circumstances, correct?

12 A. Indeed. Yes.

13 Q. Let's go to the next slide.

14 So if Black applicants are more likely to be
15 socioeconomically disadvantaged, is that by itself sufficient
16 for this variable to buy us the estimate on race?

17 A. No. It has to be an attribute that the Academy considers.
18 And as I described, Dean Latta and admissions guidelines
19 support that opinion.

20 Q. So did Professor Arcidiacono fail to reliably account for
21 socioeconomic conditions in his model?

22 A. Yes. It's true that Professor Arcidiacono includes a
23 measure of income, in particular, income -- he has a variable
24 that identifies if income is less than \$80,000 per year, but
25 that's a very broad category of income. And income -- the

1 purchasing power of \$80,000 varies a lot across geography and
2 over time with the inflation rate of 20 percent over the period
3 he considered.

4 Also, Professor Arcidiacono includes a measure of average
5 salary per ZIP code, but ZIP code encompasses a broad average
6 that has no direct connection with average salaries -- or
7 individual salaries necessarily. And he does not include any
8 measure of wealth.

9 Q. Let's go to the next slide.

10 What's being reflected on this slide, Dr. Gurrea, which is
11 Slide 25?

12 A. Yes. This is testimony by Dean Latta that corroborates
13 what I just described in terms of the unreliability of the
14 income data that Professor Arcidiacono considered. And because
15 of that lack of reliability, the Academy considers a broad set
16 of sources of information to construct the socioeconomic
17 attributes of an applicant.

18 Q. Dr. Gurrea, did you hear Professor Arcidiacono testify
19 that the measurement error in the income variable leads to
20 attenuation of the coefficient?

21 A. Yes.

22 Q. What does that mean?

23 A. It essentially means that, if you've got this noisy or
24 imprecise measure of income, it's more likely that you're going
25 to have a coefficient that's biased towards zero and is not

1 statistically significant, as he actually reported in his
2 preferred specification Model 6.

3 Q. Let's turn to Slide 26.

4 Does Mr. Kahlenberg agree with you that Professor
5 Arcidiacono failed to properly account for socioeconomic
6 conditions?

7 A. Yes. I read in Mr. Kahlenberg's expert report, and he was
8 very explicit about the poor income data that Professor
9 Arcidiacono considered. He highlighted that he only relied on
10 two very crude measures of income, and he also described how
11 ZIP code data is likely to miss the ways in which Black and
12 Hispanic students are, on average, disadvantaged. He also
13 highlighted the failure to account for wealth data.

14 Q. So let's try to tie this first opinion up, and let's go to
15 Slide 27.

16 How does this failure to properly account for
17 socioeconomic status impact his conclusions?

18 A. It's essentially an issue of attribution or interpretation
19 of the effects. So Professor Arcidiacono develops an estimate
20 and -- of the impact of the consideration of race, and he
21 attributes that race variable entirely to the consideration of
22 race.

23 As we see, there are significant variables that are not
24 accounted for fully in the model. This is information that is
25 contained in many sources of information that are not amenable

1 to statistical analysis that are correlated for race and that,
2 therefore, actually have a causal relationship with the
3 variable that Professor Arcidiacono is attributing to the
4 Academy.

5 In this illustration, the actual consideration of race is
6 much smaller than what Professor Arcidiacono reported, and
7 socioeconomic factors would account for at least some part of
8 that impact that he attributed entirely to the Academy's
9 consideration of race.

10 Q. Why can't you say for sure what impact the failure to
11 consider socioeconomic background has on the results of
12 Professor Arcidiacono's model?

13 A. Because as Professor Arcidiacono and myself agree, this is
14 information that we do not observe and do not observe in the
15 sense of it not being part of the dataset that he constructed
16 for the reason that it's not amenable to statistical analysis.

17 Q. So, Dr. Gurrea, are you saying that it's impossible to
18 estimate without bias the consideration of race due to these
19 unobserved factors?

20 A. By definition, the admissions decisions are informed in a
21 holistic process by information that is not quantifiable, and
22 therefore, the estimates cannot be calculated without bias.

23 Q. Dr. Gurrea, is your first opinion tied to Professor
24 Arcidiacono's choice of a logit regression model?

25 A. No. This is completely independent of the choice of a

1 model. This is just a more general opinion regarding what you
2 can expect to derive from a model that fails to account for a
3 lot of information that's relevant to a decision.

4 Q. Dr. Gurrea, we've discussed this problem of omitted
5 variable bias in terms of the admissions decisions to the Naval
6 Academy. Does this problem also have the same effect on
7 Professor Arcidiacono's estimates of the contribution of race
8 to the admission to NAPS?

9 A. Yes, this is exactly the same issue. It's an issue of
10 failure to account for relevant information.

11 Q. Let's turn to your second opinion and Slide 28.

12 Can you remind the Court what your second opinion is?

13 A. Yes. This is more of a technical opinion related to the
14 use of the logit model in this case.

15 Q. What is the technical opinion?

16 A. That the assumptions that Professor Arcidiacono has
17 adopted do not conform with the reality of the process that
18 he's modeling.

19 Q. All right. Why don't we take a look at Slide 29.

20 What specific assumption does the logit model make that is
21 not met in this case?

22 A. The logit model assumes that the decisions that are
23 modeled are independent. And, essentially, if you have an
24 interdependence in the unobservable in the model, then you
25 can't rely on the results of the model.

1 Q. When you say that admissions decisions are interdependent,
2 what do you mean?

3 A. That the decisions that you make today have an impact on
4 the additions that you make tomorrow.

5 Q. So what happens if admissions decisions are correlated or
6 interdependent with each other?

7 A. That the statistical analysis and the estimates that you
8 derive cannot be used because the assumptions underlying the
9 model are violated.

10 Q. Why don't we look at Slide 30.

11 Does Professor Arcidiacono agree that admissions decisions
12 are interdependent?

13 A. Yes.

14 Q. And what's reflected on Slide 30?

15 A. Yes.

16 Q. No, what's reflected on Slide 30?

17 A. Yes. A specific question about agreement regarding a
18 decision on whether to admit a candidate depends on its
19 decision to admit another candidate. And Professor Arcidiacono
20 agreed that that is the case, meaning that there is
21 interdependence across decisions.

22 Q. Let's look at Slide 31.

23 Were you in the courtroom when Professor Arcidiacono
24 explained that interdependence is only a concern when decisions
25 today enter into the model and affect the next decision?

1 A. Yes.

2 Q. Do you believe, Dr. Gurrea, that admissions decisions made
3 by the Naval Academy at a given point in time impact subsequent
4 decisions?

5 A. Yes.

6 Q. Let's look at Slide 32.

7 How are admissions decisions interdependent?

8 A. One source of interdependence is the competition among
9 applicants for a limited number of appointments. As decisions
10 for admission are made on a rolling basis, the admission of one
11 applicant affects the prospects of the admission of subsequent
12 applicants.

13 Q. Is that a function of having a fixed class size?

14 A. Yes.

15 Q. Let's look at Slide 33.

16 Does Professor Arcidiacono share your view that fixed
17 class size creates interdependence?

18 A. Yes.

19 Q. What's being reflected on Slide 33?

20 A. It reflects Professor Arcidiacono's approach to dealing
21 with interdependence.

22 So he does not deny that competition creates
23 interdependence, but the way he deals with that is to assume
24 that, rather than competing against each other, applicants
25 compete against a common standard. He deals with that by

1 explicitly modeling a fixed effect for each year. So
2 essentially there's a fixed standard, and he incorporates that
3 into the model. So according to Professor Arcidiacono, he has
4 dealt with that problem by assuming that there's a common
5 standard.

6 Now, while he makes that assumption, he acknowledged that
7 the admissions standard is not constant over time, that it
8 actually decreases as the admissions process progresses and
9 some of the admissions offers are declined. So, essentially,
10 to deal with this source of interdependence, Professor
11 Arcidiacono has imposed an assumption, but he acknowledges that
12 the assumption that he imposes is not fully consistent with
13 what actually happens in the process.

14 Q. Let's look at Slide 34.

15 Does competition within a slate also create
16 interdependence?

17 A. Yes. This is a variation of a competition. It's a unique
18 form of competition in this admissions process in that
19 congressional slates have a limited number of nominees. And
20 within those slates, when they are competitive, applicants are
21 competing for a limited -- or actually one or maybe two
22 appointments within the slate.

23 Q. Does Professor Arcidiacono share your view that slate
24 competition creates interdependence?

25 A. Yes. And he attempted to deal with that as well by

1 controlling for some slate characteristics.

2 Q. When assessing the decision to admit a candidate, does he
3 account for the strength of competing slate candidates being
4 dependent on their inclusion in multiple slates?

5 A. No. So one of the defining characteristics of this
6 process that Dean Latta described is the consideration of
7 multiple slates at the same time. And that's a feature of
8 competition across slates that creates interdependence between
9 the admissions decisions for the slate members that Professor
10 Arcidiacono did not consider.

11 Q. Let's look at Slide 35.

12 What's the third form of interdependence of admissions
13 decisions that you've identified?

14 A. It's related to just diversity in general and, more
15 specifically, to nonracial diversity. And the contribution
16 that an applicant makes to that diversity depends on prior
17 decisions and --

18 Q. Why does achieving the goal of diversity require
19 accounting for prior admissions decisions?

20 A. Because diversity relates to the concept of variety. And
21 if you admit many people with the same characteristic, then
22 that variety has been satisfied and that component of variety
23 that a subsequent applicant may also offer becomes less
24 valuable.

25 Q. And when you're talking about diversity in this context,

1 you're not talking about just racial and ethnic diversity, are
2 you?

3 A. No, exactly. This is -- specifically, I describe here,
4 nonracial diversity. And I refer here to testimony by Dean
5 Latta in terms of the significance of, for example, life
6 experiences and how they can be so determinant in the selection
7 of candidates late in the process.

8 Q. Has Professor Arcidiacono addressed the source of
9 interdependence either at trial or in his reports?

10 A. No. I highlighted this source of interdependence in my
11 initial report. And Professor Arcidiacono did not address this
12 in his reply report.

13 Q. Why don't we take a look at Slide 36.

14 Did you hear Dean Latta testify about the need to ensure
15 that at least 65 percent of a class are STEM majors?

16 A. Yes, I did.

17 Q. What does that imply in terms of interdependence of
18 admissions decisions?

19 A. Well, it sets a threshold by which there's a premium put
20 that the Academy gives to certain candidates, up to 65 percent.
21 And, therefore, the strength of an application that offers
22 these characteristics will depend on prior admissions decisions
23 and whether the Academy is closer to this threshold.

24 Q. If we can turn to Slide 37. Did Professor Arcidiacono
25 address this source of interdependence?

1 A. No.

2 Q. Let's go to Slide 38.

3 What's the fifth form of interdependence of admissions
4 decisions that you've identified?

5 A. The Academy gives priority to applicants from
6 underrepresented districts. And that -- the status of an
7 applicant as belonging to an underrepresented district depends
8 on prior decisions.

9 Q. Does Professor Arcidiacono have a variable to control for
10 congressional representation?

11 A. No.

12 Q. So, ultimately, Dr. Gurrea, what's the consequence of your
13 opinion that admissions decisions are interdependent?

14 A. As I said, the model that is being used in this case is
15 predicated on the assumption of independence across the
16 unobservables. And because of the failure to account for these
17 factors, there is interdependence that is not accounted for
18 and, therefore, the model cannot be reliably used.

19 Q. Let's turn to your third opinion, Slide 39.

20 And, again, can you just briefly remind the Court of what
21 your third opinion is in this case.

22 A. Yes. This relates to Professor Arcidiacono's
23 categorization of race and ethnicity.

24 Q. Why don't we go to Slide 40.

25 And what does Professor Arcidiacono's categorization of

1 race and ethnicity consist of?

2 A. At a high level, it's an elimination between the -- the
3 distinction between race and ethnicity, and it's also an
4 artificial assignment of multiracial candidates.

5 The specific rules for implementing this arbitrary
6 categorization is to consider any applicant that has
7 identified -- among all the races that that applicant may have
8 identified, if they pick Black as one of those, then they are
9 categorized as Black.

10 Then the same for the remaining applicants. If they
11 identify as Hispanic, then they are categorized as Hispanic
12 regardless of any race that they belong to.

13 And then the categorization falls sequentially for
14 American Indians or Alaska natives or native Hawaiians or other
15 Pacific Islanders that have not fallen into the prior two
16 categories get labeled as Native Americans or Hawaiians.
17 Asians are categorized then as Asians. Any remaining White
18 applicants are categorized as White. And those that decline to
19 respond are flagged as missing.

20 Q. What explanation does he provide for this classification?

21 A. This was the method that was followed in *Harvard*.

22 Q. Have you seen any documents or any evidence at all that
23 suggests that the Academy follows the categorization of race
24 reflected in Demonstrative 40?

25 A. No, I have not.

1 Q. Let's go to Slide 41.

2 Could you describe some examples of how his categorization
3 rules work in practice?

4 A. Yes. So the admissions process works in a way that an
5 applicant can select multiple races. And if a multiracial
6 applicant is in part Black, they will only be identified as
7 Black.

8 Then the next category includes Hispanics. Because
9 applicants that identify as Black are categorized as Black,
10 then there's no possibility to have Black Hispanic applicants.
11 They are all assigned to the Black category and not in the
12 Hispanic category.

13 Because of the prior two rules, for example, the White
14 category does not include any White Hispanics because they
15 would all be just simply categorized without distinction of
16 race into the Hispanic bucket.

17 And then as a result of the arbitrary assignment of
18 multiracial candidate to a single race, Professor Arcidiacono
19 does not have a category for multiracial applicants, although
20 applicants can self-select multiple races.

21 Q. Why don't we look at Slide 42.

22 Is this categorization material to the predictions offered
23 by Professor Arcidiacono?

24 A. Yes.

25 Q. Can you explain?

1 A. Yes. So one of the metrics that Professor Arcidiacono
2 employed to measure the impact of race is the average marginal
3 effect of race and ethnicity, which is essentially what is the
4 contribution of race to the decision that we observe, in this
5 case, the admissions decision?

6 And it's calculated by turning on and off the coefficient
7 that he estimates. And in this case, that coefficient -- that
8 average marginal effect that he estimates is 24.35 for Black
9 applicants.

10 And if you consider an alternative categorization where
11 multiracial applicants are kept as a separate category and race
12 and ethnicity is not blended, then the coefficient on Black
13 falls to 18.88 percent.

14 Q. What do you mean when you say on this slide "average
15 marginal effect"?

16 A. That -- as I said, that's the impact of the coefficient
17 on -- of race. In this case, Black on the admissions decision.

18 Q. And just so we've got a very clear record here, on
19 Slide 42, what does the blue bar represent?

20 A. That's the average marginal effect for Black applicants
21 following Professor Arcidiacono's proposed categorization.

22 Q. And the green bar?

23 A. The green bar is an alternative categorization that does
24 not impose the artificial assignment of multiracial candidates.
25 It does not blend race and ethnicity and offers an alternative

1 that illustrates the lack of robustness of his estimate.

2 Q. So under the heading, "average marginal effect of race and
3 ethnicity," there's a parenthetical that says "not the effect
4 of the Academy's consideration of race."

5 What does that mean?

6 A. It's just a reminder that the numbers that I'm reporting
7 here are the quantification that Professor Arcidiacono
8 attributes to the Academy. But, in fact, it's just the
9 estimate. And it's not necessarily the -- an accurate measure
10 of the impact of the consideration of race and ethnicity by the
11 Academy. As Professor Arcidiacono and myself agree, these
12 numbers are a biased estimate of that actual impact.

13 Q. So does that mean that the contribution of the
14 consideration of race would be less than 18.88 percent?

15 A. Yes. That's likely, yes.

16 Q. Now, this slide only indicates Black applicants. Did
17 you -- what were your findings for Asian Americans?

18 A. Yes, the same, similar direction. The effect is smaller.

19 Q. In other words, the number goes down but by a less amount?

20 A. Yes, it goes down. The starting point and the ending
21 point are smaller than reported for Black, but the direction is
22 the same.

23 Q. Let's turn to your fourth opinion. Can you please
24 describe your fourth opinion.

25 A. Yes. This fourth opinion relates to interpreting the

1 magnitude of the coefficients that Professor Arcidiacono
2 reports. And I'm just trying to highlight the point that the
3 impact that he estimates for minorities is not the impact that
4 the failure to consider race and ethnicity would have on
5 individual White applicants.

6 Q. Earlier this afternoon you referenced the phrase "zero
7 sum."

8 Do you recall that?

9 A. Yes.

10 Q. What did you mean by "zero sum"?

11 A. It's the concept that admission of one candidate comes at
12 the expense of another candidate. If you think about that
13 question at the level of racial groups, that's the concept that
14 any advantage that is given to one racial group comes at the
15 expense of another racial group.

16 Q. Let's unpack this opinion, then.

17 Let's go to Slide 44.

18 Why do you find this interpretation misleading?

19 A. It's misleading because, to begin with, the number of
20 applicants is very different across racial groups. The number
21 of White applicants across the five years that Professor
22 Arcidiacono considered is much, much larger than any of the
23 minority groups. In here, I illustrate the example of Black
24 applicants just being a fraction of the total number of White
25 applicants.

1 Q. So on this Demonstrative 44 you have 9,233 White
2 applicants; is that correct?

3 A. Yes. And the number for Black applicants is 1,240.

4 Q. And you're the math guy, not me. But is that seven times
5 the number of White applicants compared to Black applicants?

6 A. Yes, that sounds right.

7 Q. Why is it relevant --

8 And if we can go to the next slide.

9 Why is it relevant that there's seven times more eligible
10 White than Black candidates in terms of your zero sum opinion?

11 A. Because when Professor Arcidiacono simulates a world
12 without the consideration of race, he reports a massive impact
13 on Black admissions rates, and they decline by over 22 percent.
14 But for White -- for the White group, that only translates into
15 a 4.2 percent increase.

16 So the magnitude of the loss for Black applicants is
17 diluted among all the White applicants because there are so
18 many more White applicants.

19 Q. And just sort of to close the loop on this opinion, why
20 isn't this a one-for-one correspondence?

21 A. I think that is explained by the prior chart, in which you
22 can see that White applicants account for the vast majority of
23 the number of applicants. So when you think about losses or --
24 in the admissions rate for Black applicants, that has a very --
25 or relatively small impact on the prospects of an individual

1 White applicant.

2 Q. Let's turn to your next opinion in Slide 46.

3 What is your fifth opinion in this case, Dr. Gurrea?

4 A. That although Professor Arcidiacono has presented
5 simulations depicting a world without the consideration of
6 race, they actually are not a realistic prediction of that
7 counterfactual.

8 Q. All right. Let's unpack this opinion a little bit.

9 First off, what is being conveyed in Slide 47?

10 A. Yes. Professor Arcidiacono has presented a number of
11 analysis to assess the impact of the consideration of race.
12 But in terms of this specific question about the world without
13 the consideration of race, the first three analysis are
14 irrelevant. And the main analysis that is connected with this
15 question is his analysis with capacity constraints.

16 To the extent that you want to assess class composition
17 without the consideration of race, obviously, you would want to
18 maintain fixed the size of the class to begin with. And that
19 is a constraint that Professor Arcidiacono accounts for in his
20 fourth analysis.

21 Q. So let me back up a step.

22 So in terms of the transformational analysis, the average
23 marginal effect analysis, and the admitted minority analysis,
24 can those analyses be used to predict the results of class
25 composition without racial preferences?

1 A. No, because they don't take into account the size of the
2 class. The size of the class is a requirement to fill the
3 class, and it's a set number.

4 Q. And if we look at Slide 48, did Professor Arcidiacono
5 testify to that effect?

6 A. Yes. He agreed that, to estimate the entire class
7 composition, you would have to use the -- his capacity
8 constraint analysis.

9 Q. So let's focus on the capacity constraint analysis.

10 Is there anything problematic, in your opinion, about his
11 presentation of the results of his capacity constraint
12 analysis?

13 A. Yes. I find his description of this analysis to be
14 incomplete and misleading.

15 Professor Arcidiacono stated in his report that, if you
16 remove the racial preferences, you will significantly alter the
17 racial composition of the U.S. Naval Academy, increasing the
18 share of White admits by more than 6 percent.

19 Q. And if we go to Slide 50, why do you find this opinion of
20 his about modeling a but-for or counterfactual world incomplete
21 and misleading?

22 A. Well, as a preliminary point, I think it's important to
23 remember that, by his own admission, his estimates are biased
24 to begin with.

25 But more specifically in terms of this exercise, there's a

1 number of assumptions that are embedded in this counterfactual
2 that make it unrealistic for the purposes of understanding what
3 race composition would look like in a world without the
4 consideration of race.

5 And there's at least three reasons. One is that the
6 applicant that would pursue admissions to the Naval Academy may
7 change in a world where race is no longer a factor.

8 The Academy's actual admissions criteria may change. And,
9 obviously, the weights that they give to the different
10 applicant attributes would change as well since race no longer
11 would be considered in this hypothetical.

12 Q. Let's see if you can illustrate this point for us.

13 Let's go to Slide 51.

14 Could you illustrate what you mean when you say that
15 Professor Arcidiacono assumes in his counterfactual world that
16 the admissions criteria would not change?

17 A. Yeah. So this is every presentation of Professor
18 Arcidiacono's model as he put forward. And there's a number of
19 variables that are listed, and there's letters before the
20 variables that designate the coefficient or the weight that the
21 decision-maker is giving to each of these attributes.

22 And he -- to depict a hypothetical or a counterfactual
23 where race is not a factor, he just takes out of the model the
24 race variable and assumes that everything else remains
25 constant. But the truth is that, in a counterfactual, we don't

1 know what the Academy would do in terms of weighing all the
2 other variables that they take into consideration. And for
3 that reason, this approach is unrealistic.

4 Q. Let's look at Slide 52.

5 Is this concern that you are raising now about the failure
6 to accurately model a world without the consideration of race
7 something that Professor Arcidiacono has acknowledged in his
8 recently published works?

9 A. Yes. Professor Arcidiacono implemented this approach in
10 the *Harvard* case. There was no qualification about his
11 characterization. But in subsequent work where he published
12 the results of the Harvard study in the Journal of Political
13 Economy and Microeconomics in 2023, he did add a qualifier or a
14 disclaimer in which he said "this exercise" -- referring to the
15 capacity constraints analysis -- "is not meant to estimate the
16 impact of an affirmative action ban. In particular, when we
17 remove racial preferences, we do not allow schools to adjust
18 their preferences for all other applicant attributes."

19 So he's highlighting that this exercise, which he
20 described here as a world without the consideration of race,
21 actually needs to be interpreted with caution because it really
22 doesn't depict a realistic counterfactual of a world without
23 the consideration of race. It's a hypothetical where nothing
24 changes other than race.

25 Q. So just so I have the chronology right, years after

1 Professor Arcidiacono presented his model in the *Harvard* case,
2 he wrote an article acknowledging that a capacity constraint
3 model would not accurately model the counterfactual and but-for
4 world?

5 A. That's right.

6 Q. Did -- the concern that you just addressed, was that
7 something that Professor Arcidiacono acknowledged at trial?

8 A. Yes, he did.

9 Q. Did you construct, Dr. Gurrea, any analysis of what the
10 composition of the Naval Academy's admitted class would be if
11 the Naval Academy did not consider race in admissions?

12 A. No.

13 Q. Why not?

14 A. It's not possible because, as you can see, there's a
15 number of assumptions that need to be made, including the
16 reaction of applicants to the absence of the consideration of
17 race. And I -- I don't know what that is.

18 Q. If we turn to Slide 53, did Professor Arcidiacono agree
19 with you that it's not possible to model a hypothetical
20 counterfactual world?

21 A. Yes. In his words, he said he believed that it would be
22 difficult.

23 Q. So, Dr. Gurrea, just to close the loop on this, is it your
24 opinion that it's impossible to model the impact of race based
25 on the fact that we don't know how the Naval Academy or

1 potential applicants would react if it couldn't consider race?

2 A. Yes. That's right for a variety of reasons, including, to
3 begin with, that we can't develop precise estimates because we
4 don't observe the data that the Academy considered to make
5 their admissions decisions, and also because we need to make
6 some very strong assumptions about the counterfactual world.

7 We don't know, for example, how applicants would react to
8 a different set of conditions.

9 Q. Homestretch. Last opinion, Slide 54.

10 What's your last opinion, Dr. Gurrea?

11 A. My last opinion concerns the absence of evidence regarding
12 the characterization of racial balancing.

13 Q. Let's define some terms.

14 What's racial balancing?

15 A. In the context of what I've read here, I interpret it to
16 mean some stability in the shares of enrollment across races.

17 Q. Let's take a look at your Slide 55.

18 Dr. Gurrea, what's the basis for your conclusion that
19 plaintiffs claim that admissions decisions are designed to
20 achieve racial balancing lacks support?

21 A. Again, I have assessed this issue in terms of the
22 stability of enrollment shares across races, and I have found
23 significant variation across races. In the chart here, I
24 illustrate the case of Black applicants.

25 The share of Black applicants are small numbers. And if

1 you just look at the numbers, you may observe relatively small
2 differences across years. But because they're small numbers,
3 those small variations represent actually a quite significant
4 change from one year to the next.

5 The first blue chart here, 11.7 percent represents the
6 percentage change in enrollment between 2018 and 2019 for Black
7 applicants. And the next year, there's almost a mere
8 fluctuation in the opposite direction. And as time evolves,
9 the fluctuations continue, and I find similar significant
10 variation across races.

11 Q. So what conclusion do you draw based on the analysis
12 reflected in Demonstrative 55?

13 A. That there's no evidence to support this hypothesis that
14 there's this stability in enrollment shares across racial
15 lines.

16 Q. Thank you. Sorry.

17 MR. GARDNER: Thank you, Dr. Gurrea.

18 I pass the witness, Your Honor.

19 THE COURT: Thank you, Mr. Gardner.

20 With this, we'll take our late-afternoon break for about
21 10 minutes.

22 And, Mr. Mortara, are you handling this witness?

23 MR. MORTARA: I am indeed, Your Honor.

24 THE COURT: Good. We'll take a 10-minute break and
25 start in about 10 minutes, and we'll go until 5:00 today.

1 **THE CLERK:** All rise. This Honorable Court is now in
2 recess.

3 (A recess was taken from 3:37 p.m. to 3:53 p.m.)

4 **THE COURT:** Mr. Mortara, I'll be glad to hear from
5 you.

6 **MR. MORTARA:** Thank you, Your Honor.
7 May I proceed?

8 **THE COURT:** Yes. Go ahead.

9 **CROSS-EXAMINATION**

10 **BY MR. MORTARA:**

11 **Q.** Hello again, Dr. Gurrea.

12 **A.** Hello.

13 **Q.** We met at your deposition, didn't we?

14 **A.** Indeed.

15 **Q.** That lasted about 30 minutes, right?

16 **A.** Yes, that's right.

17 **Q.** Let's see if we can do better.

18 You've testified a lot for the United States, right?

19 **A.** Yes.

20 **Q.** I'm just showing on the screen your curriculum vitae. I'm
21 just highlighting on the screen. On the first page of your
22 listed testimony here, I count one, two, three, four, five
23 instances of you testifying for the United States.

24 Do you see that?

25 **A.** Yes.

1 Q. And the next page one, two, three, four, five. The last
2 two are for Wilbur Ross. He was Secretary of Commerce, right?

3 A. Yes.

4 Q. And the other one is United States Department of Commerce.
5 That's the United States. That's five more. I think that's
6 it.

7 Oh, I forgot the first page. One, two, three, four, five.
8 One of those for Joe Biden.

9 You've testified a lot for the United States, right?

10 A. Yes.

11 Q. Now, in this case, when you filed your first report, you'd
12 billed the United States government for 460 hours at \$750 an
13 hour, which is \$345,000. Is that about right?

14 A. I'll accept your math.

15 Q. And you were here most of last week, right?

16 A. Yes.

17 Q. And you said you spent the better part of six months on
18 this case.

19 What's it at now? How much have you billed the United
20 States for all of this?

21 A. I don't know.

22 **THE COURT:** I'm sorry. Repeat the question. I did
23 not hear the answer.

24 **THE WITNESS:** Yes.

25 I don't know.

1 BY MR. MORTARA:

2 Q. You don't know how many hours you put into this case and
3 how much you billed the United States government for?

4 A. I don't know.

5 Q. Is it more than a half million dollars?

6 A. I haven't done the math, but that sounds right.

7 Q. And you mentioned members of your team on direct.

8 They work at Secretariat too, right?

9 A. Yes.

10 Q. And they bill the United States too, right?

11 A. Yes.

12 Q. You didn't put in your report how much they billed the
13 United States.

14 How much do you think your team has billed the United
15 States so far?

16 A. I don't know.

17 Q. Hundreds of thousands probably.

18 A. Yes, that makes sense.

19 Q. Do you get a share of that, by the way, at Secretariat?

20 A. A share of what?

21 Q. Of what your team bills.

22 A. Yes.

23 Q. Dr. Gurrea, you're supposed to disclose your compensation
24 in your expert report. And what you just told me is that you
25 get a share of what other people bill, and you didn't disclose

1 it.

2 Do you understand that?

3 A. I understood that it was about how many -- I think the
4 question was how many hours and at what rate, and that's what I
5 included.

6 MR. MORTARA: Your Honor, we move to strike the
7 entirety of Dr. Gurrea's report. I'll just continue with the
8 cross, and you can carry the motion, if that's okay?

9 MR. GARDNER: May we be heard?

10 THE COURT: Yeah, why don't we -- Dr. Gurrea, why
11 don't you step out of the courtroom here, please. We'll deal
12 with this right now.

13 (Dr. Gurrea exited.)

14 THE COURT: Okay. First of all, on your motion to
15 strike, Mr. Mortara, what -- we went so fast through that, I
16 couldn't even get the numbers down in time.

17 What is the disclosure in terms of what he has billed and
18 then what do you think it is? First of all, you said he
19 charged 460 hours at how much an hour?

20 MR. MORTARA: At \$750 an hour.

21 THE COURT: \$750 an hour. And I haven't done the
22 math, but these are -- this is the information on the screen
23 that was supplied to you in terms of his expert report,
24 correct?

25 MR. MORTARA: Correct.

1 **THE COURT:** And that comes to, he's acknowledged, over
2 \$500,000. I'm not clear what period of time that is, but it's
3 whatever work was done on this case, which appears to be within
4 the last year, he's charged over \$500,000.

5 And then you've questioned him about his position at
6 Secretariat with respect to billing the time of others, and
7 he's -- and you're saying he has not indicated that in his
8 answer, correct?

9 **MR. MORTARA:** The rules require him to disclose his
10 compensation. What he just testified to is he had others
11 working on the case whose hourly rates were undisclosed, and he
12 participated in the sharing of revenue from those others. It
13 is undisclosed. It's a violation --

14 **THE COURT:** So it's in violation of -- which rule are
15 you citing?

16 **MR. MORTARA:** Rule 26, which requires experts to
17 disclose compensation.

18 **THE COURT:** That's true. But the point you're making
19 is it's not just compensation directly to him; it's
20 compensation in total to an organization of which he has some
21 equity interest.

22 **MR. MORTARA:** Your Honor, I think what he said was he
23 gets a piece of what's --

24 **THE COURT:** No, I understood. But the point is is
25 that he, in addition to his billing that he gets paid for

1 directly in terms of compensation, that there's compensation he
2 gets with respect to billing Secretariat and has an equity in
3 that. Okay.

4 **MR. MORTARA:** Yeah, I think that's what -- that might
5 be what he was saying. I asked him, "Do you share in that?"
6 And he said, "Yes."

7 **THE COURT:** I understand. All right.
8 Yes, Mr. Gardner.

9 **MR. GARDNER:** I can understand Mr. Mortara's
10 confusion. He has said to me repeatedly he has not been a
11 participant in this case before trial and parachuted in.

12 **THE COURT:** I'm sorry. What?

13 **MR. GARDNER:** That Mr. Mortara was not a participant
14 before trial, that he parachuted in.

15 As Mr. McCarthy well knows, we have an expert protocol in
16 this case where the parties agreed what we were going to
17 disclose with respect to experts. And what both parties agreed
18 to -- and I'm happy to produce that expert protocol if this
19 Court would like -- which, again, we didn't have signed by the
20 Court; it was an agreement between the parties -- is that we
21 were going to disclose the hourly rate and the hours billed by
22 each of our experts, that we were not disclosing nontestifying
23 consultants and the like. And that is what the parties agreed
24 to.

25 **THE COURT:** Mr. McCarthy is here in court, is he not?

1 **MR. MORTARA:** He's right here.

2 **THE COURT:** Mr. McCarthy, there's a representation as
3 to what the understanding was. And Mr. Gardner said, with
4 respect to the understanding on expert protocols, it was
5 specifically with respect to the billing rates of experts, in
6 which they charged, and it was not with respect to, I gather,
7 underlying backup staff work, I gather is the point.

8 Was that the protocol that was agreed upon?

9 **MR. MCCARTHY:** It was not my understanding that an
10 expert --

11 **THE COURT:** I'm sorry. What?

12 **MR. MCCARTHY:** It was not my understanding that an
13 expert could decline to disclose some of the income.

14 **THE COURT:** That wasn't my question.

15 My question to you was the protocols that were decided
16 upon between you and counsel. And to the extent the protocols
17 were, it would be the billing rate of the particular expert and
18 the hours expended and what the total amount was. And
19 apparently the representation from the government is that it
20 was not to include any kind of backup -- as to either side, not
21 to include backup staff or expenses.

22 **MR. MORTARA:** Your Honor --

23 **THE COURT:** No, I'm sorry. I'm sorry. Mr. Mortara,
24 when you have a dispute between counsel, it's not your place.
25 Please be quiet.

1 **MR. MORTARA:** I have --

2 **THE COURT:** I'm sorry. Just please be quiet. What
3 I'm trying to say is in terms of the civility and rules and
4 courtesies of this court, if it comes to this, I ask lawyers
5 what the understanding was.

6 Specifically, verbally back and forth, what was the
7 understanding as an officer of the court?

8 And you're telling me as an officer of the court that,
9 essentially, you did not anticipate this. My point is is
10 that -- it's very clear. The government is contending that the
11 protocols verbally that you spoke as an officer of the court,
12 it was understood as to protocols as to experts. Okay?

13 And the representation of the government is that it has to
14 do with the billing rate of the expert and the time expended,
15 whatever the total bill was.

16 Apparently, the point of view being presented now that
17 that's not compliant with Rule 26 with respect to underlying
18 interests that people may have.

19 And that's my question to you. What was your
20 understanding of the protocol?

21 **MR. MCCARTHY:** Your Honor, first, I should say that
22 this was not a verbal protocol. There is a written protocol
23 that's filed on the docket, I think.

24 **THE COURT:** That's fine.

25 **MR. GARDNER:** It's not filed on the docket.

1 **MR. MCCARTHY:** What Mr. Gardner is referring to.

2 **MR. GARDNER:** It's not filed on the docket.

3 **THE COURT:** I'm sorry. It was not?

4 **MR. GARDNER:** It is not filed on the docket, but it is
5 in writing.

6 **THE COURT:** All right. Go ahead. I think I've
7 summarized what he is representing the protocol was, and I'm
8 trying to get your response in terms of what your view of it
9 was.

10 **MR. MCCARTHY:** I don't believe it said that the
11 parties do not have to disclose the payments like that.

12 **THE COURT:** Okay.

13 **MR. MCCARTHY:** I think there's a misunderstanding.

14 **THE COURT:** So you disagree with his analysis --

15 **MR. MCCARTHY:** Yes.

16 **THE COURT:** -- of protocol.

17 Again, Mr. Mortara, you just stand by on this. This has
18 to do with counsel pretrial, and your understanding is
19 different.

20 Let me see the protocol.

21 **MR. GARDNER:** I'm happy -- I don't have it on me. I
22 did not think this was --

23 **THE COURT:** Well, we're going to find it. All the
24 papers we've got here, I guarantee we can find the protocol.

25 **MR. GARDNER:** I have it right here. Look at this.

1 **THE COURT:** Well, just put it up on the screen. We're
2 very capable of doing this.

3 **MR. GARDNER:** Okay. We can do that.

4 **MR. MORTARA:** Your Honor, while it's going up on the
5 screen, may I share my understanding?

6 **THE COURT:** Well, no. Actually, it has to do with
7 what counsel on your team was dealing with the government in
8 terms of what the protocols were. To the extent that it may
9 have been a different understanding on your part is just
10 another matter. We'll get there in a minute. Let's just go
11 step by step.

12 Let me see this on the screen, the protocol.

13 **MR. GARDNER:** We're getting it up right now, Your
14 Honor.

15 **MR. MORTARA:** I need to move, Your Honor, to see. Is
16 that okay?

17 **THE COURT:** That's fine. Absolutely.

18 Thank you, Mr. Spears. If you can give me the protocol
19 here. Let me see it.

20 **MR. GARDNER:** I'm going to refer you, Your Honor, as
21 it comes up, to paragraph E as in Edward.

22 **THE COURT:** I'm looking at paragraph numbers with
23 numbers.

24 **MR. GARDNER:** Yep. As we go down to -- there we go.
25 Right there.

1 "E. Summary identifying the total compensation of any
2 testifying expert, including the total hours spent by the
3 expert and the hourly rate or the other compensation system of
4 the expert."

5 **THE COURT:** Stop, Mr. Gardner. Here, it's very
6 simple.

7 The Court interprets this to mean summary identifying the
8 total compensation of any testifying expert, including (A)
9 total hours spent by the expert; and (B) the hourly rate or
10 other compensation system of the expert.

11 As far as I'm concerned, the phrase "or other compensation
12 system" includes any other additional income that comes to this
13 expert apart from the total number of hours and the hourly
14 rate.

15 **MR. GARDNER:** Respectfully, Your Honor, I don't
16 interpret it that way.

17 **THE COURT:** Well, it doesn't make any difference how
18 you interpret it; that's how I interpret it.

19 **MR. GARDNER:** I understand.

20 **THE COURT:** No disrespect to you; it's for me to deal
21 with a discovery matter. And it says, "the hourly rate or
22 other compensation system."

23 And Mr. Mortara has brought out from this witness that it
24 not only includes -- not only includes 460-some hours at \$750
25 an hour, but it comes within the parameter of "or other

1 compensation system" with respect to any other financial
2 interests that he has.

3 And I don't really know what that is at this point because
4 the motion was made very quickly. But he has another
5 compensation package with Secretariat. I don't know what it
6 is, what percentage it would be.

7 As far as I'm concerned, it goes to the impeachment of the
8 witness. I don't need -- because this is a bench trial,
9 Mr. Mortara, I do not need to strike his testimony. It seems
10 to me the safest way --

11 You may sit down, Mr. McCarthy. Thank you very much.

12 The safest way to deal with this is that it's a bench
13 trial; it's a matter of impeachment of this witness in terms of
14 credibility, and Mr. Mortara is free to examine him with
15 respect to -- in addition to the \$500,000-plus that he has
16 received for testifying in this case, there is also additional
17 compensation in terms of whatever his interest is in
18 Secretariat and whatever the percentage would be. I have no
19 idea what his percentage is. We'll find out.

20 I'm not going to strike his testimony or not permit him to
21 testify, but it goes to Mr. Mortara being able to attack his
22 credibility on this point.

23 And that's the safest, fairest way to do it. And it's as
24 simple as that.

25 I didn't mean to jump at you with your interpretation;

1 it's up to me to make the interpretation.

2 And I will just tell you for future references, if it says
3 "hourly rate or other composition system," if it's an hourly
4 rate, fine, but that doesn't totally cover it. There's clearly
5 other composition that's received. And apparently there --
6 well, we'll find out, but apparently there was other
7 composition received. And that's how we'll deal with it.

8 But I won't strike the testimony. I'll allow him to
9 testify, and I'll give the testimony the weight I consider it
10 deserves.

11 But I'm certainly going to permit Mr. Mortara to attack
12 his credibility or any interest he has in this case with
13 respect to having apparently been compensated over a half a
14 million dollars on the government side. So we'll wait and see.

15 Is that satisfactory? You don't waive anything,
16 Mr. Mortara, but is that satisfactory to you?

17 **MR. MORTARA:** Your Honor, absolutely. If I may just
18 briefly.

19 **THE COURT:** Sure, sure.

20 **MR. MORTARA:** I moved to strike to draw the Court's
21 attention.

22 **THE COURT:** I understand.

23 **MR. MORTARA:** I expected the Court to carry it and my
24 cross to continue.

25 It's now apparent to me that the reason that the witness

1 did not disclose these things is because the Justice Department
2 misinterpreted an agreement. I accept my learned and able
3 friend's representation that he did not understand the
4 agreement. I'll move on.

5 **THE COURT:** That's fine. By the same token, in
6 fairness to the witness, the witness may have not understood it
7 either. So --

8 **MR. MORTARA:** That is absolutely correct, Your Honor.
9 When an officer of the court stands up and says he had an
10 interpretation --

11 **THE COURT:** That's fine. That's fine.

12 **MR. MORTARA:** -- that's enough for me.

13 **THE COURT:** That's good. We'll bring him back in, and
14 we'll just continue. And I'll deal with it in terms of
15 credibility.

16 What is the time frame, by the way? When was he retained?

17 **MR. GARDNER:** My best recollection was he was
18 retained --

19 **THE COURT:** This lawsuit was filed --

20 **MR. GARDNER:** I know the lawsuit was filed in October.
21 I want to say he was retained sometime in 2024.

22 **THE COURT:** The lawsuit was filed October 5, 2023.

23 **MR. MORTARA:** He started having conversations with
24 USNA people around the spring. So I assume it was February or
25 March.

1 **MR. GARDNER:** Yeah, 2024.

2 **MR. MORTARA:** Mr. Gardner, I'll talk to the Court.

3 I accept Mr. Gardner's --

4 **THE COURT:** I understand you do. I understand.

5 So the lawsuit was filed literally within the last --
6 actually, we're close on the anniversary of the lawsuit.

7 **MR. GARDNER:** Between the lawsuit and trial, it's
8 somewhere there.

9 **THE COURT:** We applied the U.S. District Court for the
10 Eastern District of Virginia --

11 **MR. GARDNER:** Correct.

12 **THE COURT:** -- with respect to the pace of this case,
13 which I'm known to sometimes do in a mini version of the rocket
14 docket to get the case moving; so --

15 **MR. GARDNER:** Ms. Yang's an alumni.

16 **THE COURT:** That's right. That's fine.

17 So I think we're all laughing here a little bit after a
18 little bit of tension in the courtroom.

19 That's fine. He can come back in.

20 **MR. GARDNER:** Great.

21 **THE COURT:** And you may continue your cross on that
22 point, Mr. Mortara. That's fine.

23 So if someone will retrieve him.

24 Thank you, Mr. Robinson.

25 (Dr. Gurrea returns.)

1 **THE COURT:** Thank you, Dr. Gurrea. If you'll come
2 back on the witness stand, please, sir.

3 You may continue, Mr. Mortara.

4 **BY MR. MORTARA:**

5 **Q.** As the Court would probably explain if we had a jury here,
6 sometimes things have to go on outside the presence of the
7 witness.

8 **THE COURT:** You're okay. You're allowed to continue
9 to testify, but Mr. Mortara is permitted to cross-examine you
10 on any matter of compensation you're receiving in this case.

11 **THE WITNESS:** Thank you, Your Honor.

12 **BY MR. MORTARA:**

13 **Q.** You've testified about economic analysis of the market for
14 exchanges of spent nuclear fuel several times, correct?

15 **A.** Yes.

16 **Q.** And you've testified about damages relating to a breach of
17 a settlement agreement in a residential mortgage dispute,
18 right?

19 **A.** Yes.

20 **Q.** And you've also testified about class damages in relation
21 to improper property inspection and convenience fees charged to
22 mortgage borrowers, correct?

23 **A.** Yes.

24 **Q.** You've also testified about an assessment of valuation of
25 vested shares and estimated fair market value of common stock

1 in a technology services company, correct?

2 A. Yes.

3 Q. Do you remember at your deposition I asked you how many
4 peer-reviewed publications you had, and you told me that, to
5 you, peer review meant reviewed by your peers?

6 Remember that?

7 A. I think I asked you about a definition, and I think we
8 agreed on a definition. You also asked me about other possible
9 standards of review. I think you asked me about econometric
10 standards, and I think we agreed to a standard. And I answered
11 your questions, yes.

12 Q. And do you remember I said we'll get back to that at
13 trial?

14 A. I think you said something about bringing up a Google
15 Scholar.

16 Q. Yes, you remember. I said I put your name into Google
17 Scholar and I couldn't find anything.

18 You remember that?

19 A. I do, yes.

20 Q. Wow. Luckily, we have a definition of peer-reviewed
21 literature provided by Professor Arcidiacono of Duke
22 University.

23 You were here for his testimony?

24 A. Yes, I was.

25 Q. And you heard him. We asked this question and submit this

1 answer explaining the process of peer review.

2 Under this definition of peer review, how many
3 peer-reviewed publications do you have, Dr. Gurrea?

4 A. Are you asking me about academic review or peer review in
5 general?

6 Q. I'm asking you about what's described on the screen.
7 You'll submit the paper to a journal. And the editor of the
8 journal will then, if you get past the reject stage, will send
9 it out to referees. How many?

10 A. This question concerns academic peer review?

11 THE COURT: That is the question. The question is
12 academic peer review. He stated the basis of the question.
13 You may answer.

14 THE WITNESS: Yes. So I think my dissertation
15 conforms with that. Let me read so -- if we agree on the
16 terms. So there's an editor. If it's specifically about a
17 journal, then I think I have a publication in a law journal
18 that may fit this definition.

19 My dissertation is not submitted to a journal; it was a
20 handbook. So I have a series of publications that conform to
21 the definition of a peer review in the sense of a submission to
22 an editor, a review by anonymous referees, and then eventual
23 publication.

24 If the question is narrowly defined in terms of academic
25 journals, I do not have academic journal publications.

1 BY MR. MORTARA:

2 Q. So you named two. But if it's academic journals, it's
3 zero, correct?

4 A. Yes, that's correct.

5 Q. I want to talk about two of your opinions at the same
6 time.

7 Now, what's on the screen is your opinion that Professor
8 Arcidiacono estimates -- his estimates likely overstate the
9 impact of race.

10 Let's just keep that there.

11 And then you have a second opinion which you discussed
12 with Mr. Gardner and that I've got on the screen. Professor
13 Arcidiacono's simulations do not predict admissions in a world
14 without consideration of race.

15 You just gave those today. You remember them, right?

16 A. Yes.

17 Q. Some of the reasons you gave for the latter opinion, the
18 counterfactual simulations don't predict admissions in a world
19 without race, is students may change their application
20 portfolios and the Academy may change its admissions criteria,
21 right?

22 A. Yes.

23 Q. So switching back to the first one, which is -- I think
24 you used the word "bias" several times and said Professor
25 Arcidiacono overestimated the impact of race.

1 You remember that?

2 A. Yes.

3 Q. I heard you say -- I wrote it down -- that just on that
4 basis alone, the entire impact of race in the process could go
5 away.

6 Did I hear you right?

7 A. That's what Professor Arcidiacono said, that because of
8 bias it is conceivable that, if there's enough bias and it's
9 negatively correlated with the strength observed in the
10 observables, the entire impact would go away.

11 Q. Putting aside whether Professor Arcidiacono said it, you
12 said it not even an hour ago, right?

13 A. No. I think I literally read what he said. That was the
14 context.

15 Q. And you agreed with whatever it is you think he said,
16 correct?

17 A. Yes. If the bias is large enough, that's true.

18 Q. And on the right, when you're talking about, for instance,
19 the Academy changing its admissions criteria, in a world where
20 the Academy was enjoined by this Court from considering race --
21 so race cannot be considered in its admissions process -- the
22 changes the Academy would make would likely be to ameliorate
23 the impact of such a rule, right?

24 A. I don't know what the Academy would do.

25 Q. Well, you've been here. You were here most of last week.

1 A. Yes.

2 Q. You were here for some of this week.

3 A. Yes.

4 Q. You've heard Navy witnesses, Department of Defense
5 witnesses testify how important this is, right?

6 A. Yes.

7 Q. So don't you think that the Navy and the Department of
8 Defense would do things to ameliorate the impact of the loss of
9 this critical force multiplier we've heard about?

10 A. I'm sorry. I can't speak for the Academy and the
11 Department of Defense.

12 Q. No, you can't.

13 I'd like you to assume that the things that they would do
14 would be efforts to ameliorate the impact of a bar or
15 prohibition on the use of race.

16 Can you do that?

17 A. Yes.

18 Q. If that's what they were doing, then that's also going to
19 result in Professor Arcidiacono overestimating the impact of
20 race on their process in total, right?

21 A. I don't follow that logic.

22 Q. Okay. If the defense department and the Navy, they're
23 enjoined from considering race, there's some effect. It could
24 be 0 according to your Opinion 1, but there's some effect on
25 their process, right?

1 A. Yes.

2 Q. And then they're going to do things. So let's say their
3 effect their process is they lose 10 admits, 10 minority
4 admits.

5 A. Okay.

6 Q. Then they're going to do things. They're going to do
7 things to counteract that effect. And that means the effect
8 would be smaller, right?

9 A. Not necessarily.

10 Q. Oh, you're saying they could fail?

11 A. I don't know what they would do, and I don't know the
12 impact. It's an empirical question.

13 Q. Well, Dr. Gurrea, doesn't it stand to reason that, for
14 example, increasing socioeconomic preferences might ameliorate
15 the impact of not using race, based on what your testimony was
16 today?

17 A. Yes.

18 Q. So they could do that, and that would ameliorate the
19 impact. All I'm trying to establish -- this is my question --
20 is if the defense department and the Navy took steps to blunt
21 or ameliorate the impact of race, that would lower the loss of
22 minority midshipmen to the extent it existed at all?

23 A. Again, it's an empirical question. And it depends on what
24 they would do, how they would do it, and what all the other
25 moving parts would be, including the reaction of applicants and

1 other factors that vary.

2 Q. But you just said that socioeconomic preferences might
3 blunt the impact of the removal of the consideration of race,
4 right?

5 A. What I said is that the coefficient that Professor
6 Arcidiacono estimated is likely overstated because part of the
7 true impact is accounted for, socioeconomic factors, already.
8 So I'm not saying that socioeconomics are not accounted for.

9 In fact, I heard Dean Latta explain extensively that they
10 do create a picture of the economic -- the socioeconomic
11 characteristics of applicants and that they take that into
12 account already. And what I'm explaining from a statistical
13 perspective is that, if you focus on a narrower set of
14 information as contained in Professor Arcidiacono's dataset and
15 you ignore those other factors, then you're going to
16 misattribute what is already being taken into account.

17 Q. Are you done?

18 A. Yes.

19 Q. I didn't want to interrupt you.

20 A. Thank you.

21 Q. You talked about how the capacity constraints is the only
22 realistic way to measure this, if you're going to measure it at
23 all, because that keeps the class size fixed. That was your
24 slide with the four things and there was an X through the first
25 three things.

1 Do you remember that?

2 I can show you the slide if you need it.

3 A. I remember the slide. Could you repeat your question.

4 Q. So I'm showing you Professor Arcidiacono's capacity
5 constraints analysis. It's on the screen.

6 Your testimony is that the effect that he measured of
7 minus 56 Black midshipmen over class years '23 to '24 and minus
8 109 over class years '25 to '27, that might be 0 because you
9 told me the entire impact might go away if you got rid of the
10 bias, right?

11 A. No, that -- what I read was Professor Arcidiacono's
12 statement about if you addressed all the sources of bias, it's
13 conceivable that it all goes away.

14 What I said is that it's likely that the coefficient that
15 Professor Arcidiacono reported is likely overstated because of
16 the impact of these factors that are already considered.

17 Q. And when you couple that with potential ameliorative
18 measures the defense department and the Naval Academy might
19 take, you don't know whether or not this minus 56 could be
20 minus 10, minus 109, could be minus 20. It's really possible,
21 isn't it?

22 A. You're asking me what is the impact about policies that I
23 don't know that you did not describe to me, and I really don't
24 have a way to assess their empirical impact.

25 Q. Well, just based on the testimony you gave on Opinion 1,

1 these numbers are too high, right?

2 A. No, these numbers are not too high. These numbers are
3 what they are.

4 And the question is this coefficient of race in the model,
5 is it correctly attributed solely to the Academy's
6 consideration of race? And because they are factors that we
7 know that are not inside of Professor Arcidiacono's model, by
8 his own admission, by the testimony from Dean Latta, from my
9 own analysis, we understand that there are going to be other
10 contributing factors to the magnitude of that coefficient and
11 that, therefore, it's likely that that coefficient is biased.

12 Q. Your testimony is that Professor Arcidiacono overestimated
13 the impact of race on the Naval Academy's admissions process,
14 correct?

15 A. Yes. That's likely, yes.

16 Q. Who is David Card?

17 A. A Nobel laureate from -- I think he's at Berkeley. He's
18 an economist.

19 THE COURT: I'm sorry. Who is -- what is the person's
20 name.

21 MR. MORTARA: David Card.

22 THE COURT: Card. All right. Thank you.

23 BY MR. MORTARA:

24 Q. David Card is a rather famous economist, is he not?

25 A. Yes, indeed.

1 Q. David Card was Harvard's expert in the *Students for Fair*
2 *Admissions v. Harvard* trial, yes?

3 A. Yes.

4 Q. And he subsequently won a Nobel prize, you said, I think?

5 A. I don't know if it's subsequently. It may have been
6 before he submitted that report.

7 Q. I can tell you it was subsequent. When I cross-examined
8 him, he had not yet won.

9 A. Okay.

10 Q. You reviewed David Card's report from the *Harvard* case in
11 connection with your work in this case, didn't you?

12 A. Yes.

13 Q. This is Plaintiff's Exhibit 243 for identification
14 purposes only. On the screen you see your materials
15 considered, right?

16 A. Yes.

17 Q. And over on the fourth page, second thing. Right after
18 the declaration of Dean Latta, you have Dr. David Card, report
19 of David Card, PhD, Document 419-141 in the *Students for Fair*
20 *Admissions against Harvard* case, right?

21 A. Yes.

22 Q. Professor Card constructed a binary logit model of
23 Harvard's admissions process, correct?

24 A. That is correct. Of Harvard's admissions process,
25 exactly.

1 Q. I've got on the screen that docket entry from the *Harvard*
2 case marked for identification purposes as Plaintiff's 878.

3 MR. MORTARA: Would Your Honor like a copy?

4 THE COURT: No, I don't need it. That's fine.

5 BY MR. MORTARA:

6 Q. Now, talking about your Opinion 2, your Opinion 2 is that
7 Professor Arcidiacono's model violates logit assumptions
8 because admissions decisions today affect the next decision.

9 Do you see that?

10 A. Yes.

11 Q. And that's because of limited appointments within a class.

12 Do you see that?

13 A. That's one of the reasons.

14 Q. But you know, don't you, from your review of David Card's
15 report that Harvard also has a limited number of beds for
16 freshmen, right?

17 A. I can't remember that, but it's reasonable.

18 Q. It's reasonable to believe that Harvard can't just admit
19 as many freshmen as they want, right?

20 A. That's reasonable, yes. I don't know how fixed their
21 numbers are, but that's reasonable.

22 Q. And you know, don't you, from your review of David Card's
23 report that Harvard does not make all of its admissions
24 decisions at once, correct?

25 A. I can't remember that.

1 Q. Well, let me try to help you.

2 Excuse me. I hit the wrong thing. One moment. Let's get
3 your slide back up. Now I'll help you.

4 This is page 23 of Plaintiff's Exhibit 878, David Card's
5 report. And at the bottom you see Footnote 22 describing the
6 early action admissions process to Harvard, which concludes in
7 December when offers of admission are made and some people can
8 be accepted and some people can be deferred to regular
9 decision.

10 Do you see that?

11 A. Yes.

12 Q. Harvard makes its admissions decisions at different times,
13 correct?

14 A. That seems to be the case, yes.

15 Q. I want to talk about one of your other opinions.

16 You said Professor Arcidiacono acknowledges standards
17 change during the cycles. And this is part of your Opinion 2
18 that the whole exercise violates logit extensions. Obviously,
19 the standards for early action and regular decision at Harvard
20 are different, as some people are denied early action admission
21 and then later accepted for regular decision, right?

22 A. I don't know specifically how that works at Harvard.

23 Q. Well, if you go through the process at early action and
24 you don't get it and then you do go at regular decision and you
25 do, that means the standards have changed, right?

1 A. I'm sorry. I'm not that familiar with the process at
2 Harvard.

3 Q. You reviewed this in preparing your expert report?

4 A. I read Dr. Card's report, but I don't have access to all
5 the documentary evidence behind his analysis.

6 Q. You read his report, correct?

7 A. Yes.

8 Q. Let's look at your Slide 35.

9 "Status as a candidate adding nonracial diversity depends
10 on prior decisions. The Academy's admissions goals are defined
11 in terms of class composition and variety."

12 Do you see that?

13 A. Yes.

14 Q. That refers to the fact that the Academy seeks to enroll a
15 diverse class across a variety of dimensions, correct?

16 A. Correct.

17 Q. You know that Harvard also sought that too, sir, right?

18 A. That sounds right.

19 Q. Well, let's just make sure. Here's Professor Card's
20 report right up at page 6. You would have seen in
21 paragraph 11, "Harvard's ultimate goal is to admit a student
22 body that exhibits excellence in a variety of forms and
23 includes students with diverse experiences, backgrounds,
24 skills, and interests."

25 Do you see that?

1 A. Yes.

2 Q. That's variety, isn't it?

3 A. Yes.

4 Q. And then over on page 22, paragraph 41, he says it again.

5 "As noted above, my understanding is that Harvard seeks to
6 admit not just a set of individuals with distinguishing
7 excellences but also a class that includes individuals with a
8 wide range of life experiences and perspectives."

9 Do you see that?

10 A. Yes.

11 Q. That is also variety?

12 A. Yes.

13 Q. Dr. Card used a binary logit model of Harvard's admissions
14 process, didn't he?

15 A. Yes, it was a different process. And that's true, yes.

16 Q. Let's go to your slide about STEM. You said STEM is very
17 important, but you know that Harvard cares about the intended
18 concentration of its admitted class, don't you?

19 A. I don't recall.

20 Q. Well, you would have read that in the Card report as well.
21 Here we are at page 52.

22 "Because Harvard seeks to admit a class that is diverse
23 with respect to intended concentrations, the effect of an
24 applicant's intent to concentrate in a given field might well
25 change when the aggregate interests in the applicant pool as a

1 whole vary over time."

2 Do you see that?

3 A. Yes.

4 Q. You agree Harvard seeks to admit a class that is diverse
5 with respect to intended concentrations or major, correct?

6 A. Yes.

7 Q. Let's look at your Slide 38.

8 You said status as a candidate from underrepresented
9 district depends on prior decisions.

10 Do you remember that?

11 A. Yes.

12 Q. But you know from your review of the Card report in the
13 *Harvard* case that Harvard cares about geographic diversity too,
14 right?

15 A. I don't recall.

16 Q. You would have seen that when you reviewed the Card report
17 at page 57 in paragraph 117.

18 "Harvard seeks a diverse class in each year on any number
19 of dimensions -- academic, extracurricular, geographic, racial
20 and ethnic, and so on."

21 Do you see that?

22 A. Yes.

23 Q. Dr. Card, at least when you reviewed his report, never
24 once says in his report, "I can't do a binary logit model
25 because Harvard makes decisions at different times and values

1 diversity and cares about intended concentration because of
2 something Ken Train said."

3 Did he say that in his report?

4 A. I don't recall.

5 Q. No, Dr. Card just won a Nobel prize. He never pointed out
6 in his Harvard report that a logit model was not possible to do
7 of Harvard admissions system, did he?

8 A. Of Harvard's admissions? I don't recall.

9 Q. And Professor Arcidiacono has published his work on the
10 Harvard admissions process in the academic and peer-reviewed
11 literature, correct?

12 A. Yes.

13 Q. I want to go to one of your other opinions. Here you say
14 Professor Arcidiacono arbitrarily blends race and ethnicity and
15 assigns multiracial applicants to other categories. This is
16 your Opinion 3. And one of the issues you have is categorizes
17 multiracial candidates as Black and part Black.

18 Do you see that?

19 A. Yes.

20 Q. And you said to my friend Mr. Gardner, you never saw
21 anything from the U.S. Naval Academy admissions process that
22 looked like any of this, correct?

23 A. At the admissions -- during the admissions process?
24 That's correct.

25 Q. But you know that Dean Latta frequently presents

1 information in this way, don't you?

2 A. It's possible, yes.

3 Q. Well, you were here for his direct examination by my
4 friend Mr. Strawbridge, who bears some physical resemblance to
5 me, right?

6 A. Yes.

7 Q. And you saw Plaintiff's Exhibit 207, which is an email
8 from Bruce Latta to Superintendent Buck, right?

9 A. Yes.

10 Q. It includes updated stats on the class of 2026.
11 Do you see that?

12 A. Yes.

13 Q. And on the next page there's racial information for
14 classes -- minorities going all the way back to 2017. And you
15 know that that African American column, that includes
16 multiracial African Americans, don't you?

17 A. Yes, but these are summaries; these are not individual
18 applicant files.

19 Q. You know that the Naval Academy and Dean Latta is
20 frequently interested in race as it pertains to Blacks,
21 including Black Americans that identify as only part Black and
22 are multiracial, correct?

23 A. I think he's interested about all applicants, including
24 African American applicants and multiracial African American
25 applicants.

1 Q. And here he's showing multiracial African American
2 applicants, right?

3 A. Yes. And this masks part of the information that is
4 available to the admissions officials.

5 Q. Did Dean Latta say, "Superintendent Buck, I'm very sorry
6 I'm presenting the information this way; it masks part of the
7 information"?

8 A. No. This is a summary.

9 Q. I want to go to another slide of yours which I really
10 enjoyed.

11 This was your slide on racial balancing, correct?

12 A. Yes.

13 Q. And you were here responding to plaintiff's allegation
14 that the U.S. Naval Academy is engaged in racial balancing.
15 You were here for my opening statement?

16 A. Yes, I was.

17 Q. And you saw me put this on the screen, which are the data
18 from class portraits, correct?

19 A. Yes.

20 Q. You actually have this same data in your expert report,
21 correct?

22 A. That sounds right.

23 Q. And you saw me then put on the left side of the slide a
24 portion of the Supreme Court's opinion in *Students for Fair*
25 *Admissions against Harvard*, and it pertains to Harvard,

1 correct?

2 A. Yes.

3 Q. And you heard me say the Naval Academy is racial balancing
4 just like Harvard was, right?

5 A. I can't remember, but yes.

6 Q. I said something to that effect.

7 A. Okay.

8 Q. And your response to our allegation that the Naval Academy
9 is engaged in racial balancing appears on the left side of the
10 screen in the slide you just used with my friend Mr. Gardner,
11 correct?

12 A. Yes.

13 Q. Harvard denied it was racial balancing, didn't it?

14 A. I don't remember.

15 Q. Do you know how it worked out for Harvard? Do you know
16 what the result of the case was?

17 A. At what level?

18 Q. Who won?

19 A. At what level?

20 Q. At the Supreme Court of the United States, sir.

21 A. I think it was plaintiffs.

22 Q. Yeah, that's us, right?

23 A. I'm sorry?

24 Q. We are Students for Fair Admissions.

25 A. Okay. Yes.

1 Q. Where did you get the idea for the slide?

2 A. From the data, from looking at the data.

3 Q. Are you sure?

4 THE COURT: I'm sorry. I can't hear you, sir. I
5 can't hear what you said, please.

6 THE WITNESS: I'm sorry.

7 From looking at the data.

8 THE COURT: Okay. That's fine.

9 BY MR. MORTARA:

10 Q. You're sure?

11 A. Yes.

12 Q. You're sure that the notion of creating this information
13 and presenting it in this way came from just looking at the
14 data?

15 A. I did not create the information.

16 Q. Who did?

17 A. The Academy created the -- compiled the enrollment data
18 that I relied on.

19 Q. We've had a misunderstanding.

20 Who decided to present the data in the way that you see on
21 the left side of the screen in the slide that you just showed
22 25 minutes ago?

23 A. You're referring to this one to the left?

24 Q. Yes.

25 A. It's my slide. I decided.

1 Q. And you're sure that the idea for this came from just
2 looking at the data?

3 A. Well, it's -- it was part of my overall assignment to
4 assess this question. And I looked at the data and constructed
5 the summary I included in my report.

6 Q. You're sure you didn't get the idea from what's been
7 marked for identification purposes as Plaintiff's Exhibit 878,
8 David Card's report that you reviewed?

9 And I'm showing you Exhibit 33. You're sure you didn't
10 get the idea from Professor Card?

11 A. This is a very elementary analysis of changes in year over
12 year percentages. And there's nothing unique about this. It's
13 probably the most common kind of table that I've ever seen.

14 Q. How did this argument work out for Harvard?

15 A. I don't know the specific argument.

16 Q. As a reminder, you've never before testified about logit
17 models with binary outcomes, correct?

18 A. Correct.

19 Q. You've never published in the academic peer-reviewed
20 literature about binary outcome logit models, correct?

21 A. Correct.

22 Q. The DOJ could have hired David Card possibly, right?

23 A. Is that a question for me?

24 Q. Yeah. They could have. It's possible, right?

25 A. I don't know if they had any restrictions. I can't answer

1 for them.

2 Q. It's possible they could have hired Caroline Hoxby, who
3 testified for UNC. It's possible, right?

4 A. I'm sorry. I don't know if there's any limitation to
5 that.

6 Q. But they hired you instead, right?

7 A. That's true.

8 MR. MORTARA: I have no more questions, Your Honor.

9 THE COURT: Thank you.

10 Redirect, Mr. Gardner.

11 REDIRECT EXAMINATION

12 - - -

13 BY MR. GARDNER:

14 Q. Dr. Gurrea, is it your opinion that Dr. Card was wrong to
15 use a logit model in the *Harvard* case?

16 A. No, not at all.

17 Q. Are there differences between what you understand the
18 Harvard admissions process to be and what the Naval Academy's
19 admissions process to be that would explain why you do not
20 believe a logit model is appropriate here?

21 A. Yes. And we've discussed a couple of sort of high-level
22 dimensions about the suitability of the logit model. One was
23 competition and the other one was variety. And there's
24 definitely some very unique features in this case in terms of
25 both of those aspects.

1 And one of them was in terms of competition, the
2 nominations process and the congressional nominations and the
3 congressional slates and the close interaction between
4 candidates within slates. And, again, I don't think there's
5 any dispute that the interdependence is an issue. And I
6 acknowledge that Professor Arcidiacono explicitly made some
7 effort to address this concern. It's not like it's something
8 that does not need to be addressed.

9 I don't know to what extent Professor Card addressed that
10 concern in the *Harvard* case. Professor Arcidiacono made some
11 effort to do that. And what I found is that there were
12 elements of competition that created interdependence that he
13 did not address.

14 Q. Did Harvard use a congressional nominations process?

15 A. No.

16 Q. Did Harvard have a requirement that it accept 65 percent
17 STEM majors?

18 A. No.

19 Q. How did those forms of interdependence impact your opinion
20 that the use of a logit model here is inappropriate?

21 A. Yes, as I said, it imposes some rigidity in the process.
22 It imposes requirements that create an interdependence, and as
23 I said, Professor Arcidiacono made some effort to address some
24 of these issues. And in some of them, he didn't address them
25 at all.

1 **MR. GARDNER:** Thank you. No further questions.

2 **THE COURT:** Thank you, Mr. Gardner.

3 Any recross on this, Mr. Mortara?

4 **MR. MORTARA:** No, Your Honor.

5 **THE COURT:** All right.

6 Dr. Gurrea, you can step down now. You should not talk
7 about your testimony with anyone in the event that you're
8 called back to the witness stand before this trial concludes
9 this week. Thank you very much.

10 We need -- you're excused, sir. Thank you.

11 I just want to go over some scheduling with counsel here.

12 With respect to scheduling, I'll be able to explain this
13 to you more tomorrow, but, for a lot of reasons, it's most
14 convenient for all of you if you start at 11:00 tomorrow, not
15 10:00, because of some courthouse matters. And I don't have
16 time to go into the whole detail.

17 But it's for your convenience that it's better that way.
18 It just works out much better. We're going to end up wasting a
19 lot of time. We're going to have trouble starting right at
20 10:00; so we'll start at 11:00.

21 We have two more witness, to my knowledge. There may be
22 others. But we have Captain Ed Sundberg and Stephanie Miller
23 are the two remaining witnesses.

24 As I recall here, Captain Ed Sundberg was listed as
25 expected to call by both parties. And Stephanie Miller was

1 listed expected to call by the defendants and may call by the
2 plaintiff.

3 So, Mr. Gardner, you are calling both those witnesses
4 tomorrow, correct?

5 **MR. GARDNER:** I don't know how long plaintiffs have
6 for Captain Sundberg. I think our examination could be
7 15 minutes.

8 **THE COURT:** My question is are you calling Captain
9 Sundberg?

10 **MR. GARDNER:** Yes. Yes, we will.

11 **THE COURT:** So, essentially, the way we'll work this
12 is, since essentially the witness is being called by both,
13 you'll call -- Captain Sundberg is next and after that is
14 Stephanie Miller.

15 And then, Mr. Mortara, you'll obviously cross-examine and
16 cross-examine them as your witnesses or hostile witnesses,
17 whatever you choose.

18 And are there any other witnesses you're anticipating at
19 this time?

20 **MR. GARDNER:** No. We will be resting at this time.

21 **THE COURT:** Mr. Mortara, any other witnesses you
22 anticipate?

23 **MR. MORTARA:** No. We'll be resting simultaneously
24 with the Department of Justice.

25 **THE COURT:** We have those two witnesses tomorrow.

1 Again, not holding you to it, but what is your estimate in
2 terms of the length of your presentation and your
3 cross-examination? What is the total amount of time that you
4 think it's going to take for these two witnesses?

5 **MR. GARDNER:** Total amount of time for us on direct I
6 think would be no more than two hours and 20 minutes.

7 **THE COURT:** Two hours and 20 minutes for both of them.

8 **MR. GARDNER:** Captain Sundberg is very short, and he
9 is here.

10 **THE COURT:** I understand.

11 From your point of view, is it safe to say that we have
12 maybe four hours of testimony tomorrow? Is that realistic?

13 **MR. MORTARA:** Definitively.

14 **THE COURT:** But probably not any more than that?

15 **MR. MORTARA:** Probably less.

16 **THE COURT:** My thought is we'll start at 11:00, and
17 let's see how we go. We could just -- we'd go from 11:00 to
18 1:00 and then take a break and then go 2:00 until when we
19 finish. That seems that's the best way to do it.

20 So we'll start at 11:00; we'll go until 1:00. We'll take
21 a break for an hour for lunch, and then we start at 2:00. And
22 whenever we finish, we finish.

23 And then you all can go over and make sure we're clear on
24 the exhibits. So with the --

25 Who is handling these two witnesses tomorrow, Mr. Gardner,

1 for you?

2 **MR. GARDNER:** Mrs. Gargeya is handling Captain
3 Sundberg, and Mr. Carmichael will be handling Ms. Miller.

4 **THE COURT:** So you're able to use the rest of your
5 team to be getting your exhibits together and make sure we're
6 clear.

7 **MR. GARDNER:** We will do that.

8 **THE COURT:** Mr. Mortara, how about you?

9 **MR. MORTARA:** War Eagle here is handling Captain
10 Sundberg, and Mr. Strawbridge is handling Ms. Miller.

11 **THE COURT:** So you're able to use your talents to
12 organize your side in terms of the exhibit numbers.

13 And, again, I want to make sure I have a reasonably good
14 definition of the exhibits in evidence, and then my thinking is
15 we'll take time to do that tomorrow that you're satisfied with
16 staff here. And then we will have closing argument at 10:00 on
17 Thursday, is the schedule I'm looking at.

18 Is that good for you?

19 **MR. MORTARA:** Great for me and Mr. Strawbridge.

20 **THE COURT:** Good for you, Mr. Gardner?

21 **MR. GARDNER:** Yes, Your Honor.

22 **THE COURT:** Is there anything else this evening from
23 your point of view, Mr. Mortara?

24 **MR. MORTARA:** None from us, Your Honor.

25 **THE COURT:** Thank you.

1 Mr. Gardner, anything else from your point of view?

2 **MR. GARDNER:** Nothing from the government.

3 **THE COURT:** With that, we are finished for the day.

4 Ronda, we finished before 5:00, finally. How's that?

5 That's good? Okay.

6 **THE COURT REPORTER:** Yes.

7 **THE COURT:** With that, we stand adjourned for the day.

8 Thank you all very much.

9 **THE CLERK:** All rise. This Honorable Court is now
10 adjourned for the day.

11 (Court adjourned at 4:47 p.m.)
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CERTIFICATE OF OFFICIAL REPORTER

I, Ronda J. Thomas, Registered Merit Reporter, Certified Realtime Reporter, in and for the United States District Court for the District of Maryland, do hereby certify, pursuant to 28 U.S.C. § 753, that the foregoing is a true and correct transcript of the stenographically-reported proceedings held in the above-entitled matter and the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 24th day of September 2024.

Ronda J. Thomas

Ronda J. Thomas, RMR, CRR
Federal Official Reporter

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| <p>BY MR. CARMICHAEL: [4] 89/8 99/10 102/2 103/21 108/10</p> <p>BY MR. GARDNER: [4] 135/4 146/2 146/14 147/8</p> <p>BY MR. MORTARA: [8] 189/10 191/1 204/4 204/12 207/1 213/23 215/5 224/9</p> <p>BY MR. ROBINSON: [3] 7/1 33/9 86/18</p> <p>BY MR. STRAWBRIDGE: [7] 40/20 43/8 52/10 52/17 53/5 54/21 72/19</p> <p>BY MS. WYRICK: [2] 123/7 124/4</p> <p>MR. CARMICHAEL: [5] 89/8 102/20 108/6 122/20 132/2</p> <p>MR. GARDNER: [42] 89/1 133/18 145/17 146/1 146/10 146/13 146/20 146/23 147/3 147/7 188/17 192/9 194/9 194/13 196/25 197/2 197/4 197/21 197/25 198/3 198/13 198/20 198/24 199/15 199/19 202/17 202/20 203/1 203/7 203/11 203/15 203/20 228/1 229/5 229/10 229/20 230/5 230/8 231/2 231/7 231/21 232/2</p> <p>MR. MCCARTHY: [7] 195/9 195/12 196/21 197/1 197/10 197/13 197/15</p> <p>MR. MORTARA: [32] 145/22 188/23 189/6 192/6 192/20 192/25 193/9 193/16 193/22 194/4 195/1 195/22 196/1 198/4 198/15 201/17 201/20 201/23 202/8 202/12 202/23 203/2 213/21 215/3 226/8 228/4 229/23 230/13 230/15 231/9 231/19 231/24</p> <p>MR. ROBINSON: [10] 3/13 5/16 5/20 33/3 33/7 40/12 86/8 86/11 86/14 88/15</p> <p>MR. STRAWBRIDGE: [9] 40/16 43/5 52/6 52/15 53/3 72/16 72/18 86/5 88/18</p> <p>MS. WYRICK: [5] 122/23 123/2 124/3 127/4 132/5</p> <p>THE CLERK: [14] 3/4 3/7 52/9 89/3 89/12 89/15 89/20 132/16 133/9 133/12 133/16 134/25 189/1 232/9</p> <p>THE COURT REPORTER: [1] 232/6</p> <p>THE COURT: [139] 3/2 3/11 5/14 5/18 5/21 33/5 40/14 40/18 43/3 52/8 52/13 52/16 52/24 53/4 54/19 72/15 72/17 86/6 86/9 86/12 86/15 88/16 88/19 89/2 89/6 89/10 89/21 102/19 103/16 108/8 122/21 123/1 123/4 123/23 127/8 127/12 127/19 127/22 127/25 128/7 128/10 128/15 128/22 129/3 129/5 129/15 130/4 130/6 130/15 130/24 131/6 131/22 132/3 132/6 132/9 132/19 133/17 134/10 134/16 135/2 145/20 145/23 146/12 146/22 146/25 147/4 188/19 188/24 189/4 189/8 190/22 192/10 192/14 192/21 193/1 193/14 193/18 193/24 194/7 194/12 194/25 195/2 195/11 195/14 195/23 196/2 196/24 197/3 197/6 197/12 197/14 197/16 197/23 198/1 198/6 198/17 198/22 199/5 199/17 199/20 201/19 201/22 202/5 202/11 202/13 202/19 202/22 203/4 203/9 203/12 203/16 203/21 204/1 204/8 206/11 213/19 213/22 215/4 224/4 224/8 226/9 228/2 228/5 229/8 229/11 229/21 229/25 230/7 230/10 230/14 230/16 231/4 231/8 231/11 231/20 231/22 231/25 232/3 232/7</p> <p>THE WITNESS: [30] 3/9 5/22 43/7 53/1 89/18 103/20 127/11 127/18 127/21 127/23 128/6 128/9 128/13 128/21 129/2 129/4 129/14 130/3 130/5 130/14 130/23 131/4 131/21 132/8 133/14 134/15 190/24 204/11 206/14 224/6</p> | <p>.34 [1] 8/18</p> <p>.4 [1] 5/3</p> <p>.5 [3] 10/4 10/16 37/11 10/62/7</p> <p>58/3 81/7</p> <p>.7 [1] 10/7</p> <p>.8 [2] 10/7 59/12</p> <p>0</p> <p>026 [2] 52/14 52/24</p> <p>02s [1] 128/23</p> <p>03s [1] 128/23</p> <p>05 [1] 96/21</p> <p>05s [1] 96/21</p> <p>06 [2] 96/18 96/21</p> <p>06s [1] 96/25</p> <p>1</p> <p>1 percent [2] 87/16 119/15</p> <p>1,000 [1] 91/14</p> <p>1,240 [1] 181/3</p> <p>1.2 [1] 59/4</p> <p>1.3 [1] 56/19</p> <p>1.3 percent [1] 59/5</p> <p>1.4 [1] 56/19</p> <p>10 [12] 50/20 58/17 62/18 62/20 100/25 123/2 123/4 188/21 188/25 210/3 210/3 212/20</p> <p>10 percent [3] 6/8 6/10 65/1</p> <p>10 percentage [1] 57/7</p> <p>10,000 [1] 97/8</p> <p>10-minute [2] 88/23 188/24</p> <p>100 [1] 142/11</p> <p>109 [2] 212/8 212/20</p> <p>10:00 [4] 132/23 133/5 228/15 228/20</p> <p>10:00 on [1] 231/16</p> <p>10:02 [1] 3/1</p> <p>10:03 [1] 1/7</p> <p>11 [1] 217/21</p> <p>11.7 [1] 188/5</p> <p>117 [1] 219/17</p> <p>11:00 [5] 132/23 133/2 228/20 230/16 230/20</p> <p>11:00 and [1] 133/5</p> <p>11:00 to [1] 230/17</p> <p>11:00 tomorrow [1] 228/14</p> <p>11:49 [1] 89/5</p> <p>12 [3] 25/21 128/5 129/12</p> <p>12.7 percent [2] 25/25 26/4</p> <p>123 [1] 2/9</p> <p>12:08 [1] 89/5</p> <p>13 [2] 105/14 105/15</p> <p>133 [1] 2/11</p> <p>134 [1] 42/1</p> <p>14 [2] 101/2 157/4</p> <p>141 [1] 214/19</p> <p>15 [3] 106/12 106/13 157/17</p> <p>15 minutes [1] 229/7</p> <p>16 [2] 158/12 158/13</p> <p>17 [2] 159/11 160/5</p> <p>178.9 percent [1] 25/20</p> <p>18 [4] 50/20 80/9 80/10 160/13</p> <p>18-month [1] 93/6</p> <p>18.88 percent [2] 178/13 179/14</p> <p>189 [1] 2/11</p> <p>18th [2] 51/10 51/11</p> <p>19 [2] 113/13 162/6</p> <p>1900 [2] 78/5 78/11</p> <p>1917 [1] 35/18</p> <p>1945 [1] 81/23</p> <p>1946 [2] 32/6 81/24</p> <p>195 [7] 5/14 5/16 33/6 33/8 44/13 49/20 60/2</p> <p>1968 [1] 113/13</p> <p>1987 [1] 90/22</p> <p>1993 [1] 46/11</p> <p>1994 [1] 46/18</p> <p>1995 [1] 45/5</p> <p>1996 [1] 45/5</p> <p>19th [1] 13/10</p> <p>1:00 [1] 230/20</p> <p>1:00 and [1] 230/18</p> <p>1:07 [1] 132/18</p> <p>1:23-cv-2699-RDB [1] 1/5</p> <p>1st [1] 84/9</p> <p>2</p> <p>2.1 [1] 56/18</p> <p>2.8 [1] 58/19</p> <p>20 [16] 25/10 36/18 37/5 37/6 37/8 38/12 42/4 80/8 134/2 140/12 140/19 162/22</p> | <p>163/16 212/20 230/6 230/7</p> <p>20 percent [2] 4/21 166/2</p> <p>20-year [1] 134/7</p> <p>200 [1] 146/4</p> <p>2001 [2] 139/19 139/21</p> <p>2004 [1] 38/18</p> <p>2006 [1] 38/19</p> <p>2017 [4] 25/4 26/5 28/5 221/14</p> <p>2018 [1] 188/6</p> <p>2019 [2] 83/17 188/6</p> <p>2020 [3] 11/15 83/17 84/9</p> <p>2021 [10] 32/12 32/19 82/14 83/9 83/11 83/16 85/1 90/17 95/4 103/1</p> <p>2022 [2] 61/4 105/13</p> <p>2023 [3] 61/4 185/13 202/22</p> <p>2024 [5] 1/7 2/2 202/21 203/1 233/12</p> <p>2026 [1] 221/10</p> <p>207 [1] 221/7</p> <p>20th [1] 79/3</p> <p>21st [1] 131/3</p> <p>22 [9] 52/4 52/20 53/2 53/3 94/7 94/11 96/10 216/5 218/4</p> <p>22 percent [2] 30/1 181/13</p> <p>220 [2] 14/17 128/1</p> <p>226 [1] 2/12</p> <p>229 [2] 128/2 128/4</p> <p>23 [5] 26/7 60/6 60/8 165/1 216/4</p> <p>23.3 percent [1] 25/23</p> <p>230 [1] 129/12</p> <p>24 [9] 1/7 2/2 51/24 52/2 52/3 52/13 52/24 52/25 53/1</p> <p>24.35 [1] 178/8</p> <p>24.4 [1] 26/1</p> <p>24/7 [1] 111/8</p> <p>243 [1] 214/13</p> <p>247 [1] 71/15</p> <p>24th [1] 233/12</p> <p>25 [6] 59/24 60/3 60/6 60/7 166/11 224/22</p> <p>25 percent [2] 7/9 64/22</p> <p>26 [4] 105/13 167/3 193/16 196/17</p> <p>26 percent [1] 64/23</p> <p>27 [1] 167/15</p> <p>28 [2] 169/11 233/6</p> <p>29 [1] 169/19</p> <p>2:00 [1] 230/21</p> <p>2:00 until [1] 230/18</p> <p>2:11 [1] 132/18</p> <p>3</p> <p>3 percent [1] 59/5</p> <p>30 [8] 101/13 101/15 101/24 102/1 170/10 170/14 170/16 189/15</p> <p>31 [1] 170/22</p> <p>31.2 percent [1] 25/22</p> <p>32 [2] 99/7 171/6</p> <p>33 [3] 171/15 171/19 225/9</p> <p>34 [1] 172/14</p> <p>35 [2] 173/11 217/8</p> <p>35,000 [1] 97/15</p> <p>36 [1] 174/13</p> <p>36.11 percent [1] 153/4</p> <p>37 [2] 92/9 174/24</p> <p>37.28 percent [1] 153/6</p> <p>38 [2] 175/2 219/7</p> <p>39 [1] 175/19</p> <p>3:37 [1] 189/3</p> <p>3:53 [1] 189/3</p> <p>4</p> <p>4.2 percent [1] 181/15</p> <p>40 [5] 2/6 127/15 138/3 175/24 176/24</p> <p>40 percent [1] 128/3</p> <p>41 [4] 64/1 92/10 177/1 218/4</p> <p>419-141 [1] 214/19</p> <p>42 [3] 28/11 177/21 178/19</p> <p>44 [2] 180/17 181/1</p> <p>44 percent [1] 31/4</p> <p>45 percent [1] 7/12</p> <p>46 [1] 182/2</p> <p>460 [2] 190/12 192/19</p> <p>460-some [1] 199/24</p> <p>47 [1] 182/9</p> <p>48 [1] 183/4</p> <p>4:47 [1] 232/11</p> <p>5</p> <p>5,500 [1] 12/1</p> <p>50 [2] 138/3 183/19</p> <p>50 percent [2] 129/21 130/25</p> |
|---|---|---|

| | | |
|---|---|---|
| 5 | above [3] 1/9 218/5 233/9 above-entitled [2] 1/9 233/9 abroad [2] 17/17 15/5 absence [5] 82/3 88/2 151/6 186/16 187/11 absolutely [16] 3/4 5/13 7/6 13/7 16/21 18/25 22/3 67/11 101/14 108/8 119/2 124/3 146/12 198/17 201/17 202/8 absolutes [1] 125/16 abstract [2] 61/15 61/19 academic [16] 12/2 12/18 17/15 123/21 138/8 139/23 140/3 206/4 206/10 206/12 206/24 206/25 207/2 219/19 220/10 225/19 ACADEMY [88] 1/6 1/22 42/14 42/16 42/19 42/22 43/19 67/16 82/23 85/5 85/8 85/13 85/17 85/21 86/1 90/19 90/23 90/25 91/4 92/10 94/2 109/12 109/14 109/17 109/22 109/24 113/14 113/16 113/20 123/14 123/18 123/19 126/1 126/5 126/12 127/16 128/3 129/19 141/25 142/4 147/18 147/20 149/13 151/21 151/24 152/4 152/18 153/12 153/18 155/14 156/9 156/24 157/13 158/3 164/20 164/21 164/23 165/17 166/15 168/4 169/6 171/3 174/20 174/23 175/5 176/23 179/8 179/11 183/17 184/6 185/1 186/11 186/25 187/4 207/20 208/19 208/20 208/22 208/24 209/10 212/18 217/14 220/21 221/19 222/14 223/3 223/8 224/17 Academy's [18] 83/2 147/13 148/4 149/2 149/7 155/4 155/13 155/19 158/5 163/22 168/8 179/4 184/8 186/10 213/5 213/13 217/10 226/18 accept [4] 190/14 202/2 203/3 227/16 acceptance [1] 137/5 accepted [5] 12/16 145/11 145/23 216/8 216/21 access [10] 19/4 21/2 21/8 32/5 32/8 38/22 49/1 68/22 164/6 217/4 accidentally [1] 35/8 accompany [1] 146/16 according [5] 32/15 82/12 153/7 172/3 209/24 account [26] 62/8 62/23 66/11 76/12 76/25 77/5 77/8 109/7 149/10 154/2 162/8 162/16 164/22 165/20 167/5 167/13 167/16 168/7 169/2 169/10 173/3 175/16 181/22 183/1 211/12 211/16 accounted [7] 62/12 76/22 155/7 167/24 175/17 211/7 211/8 accounting [1] 173/19 accounts [3] 15/1 152/15 182/19 accurate [8] 59/2 99/1 148/11 148/16 157/25 158/24 159/16 179/9 accurately [2] 185/6 186/3 achieve [1] 187/20 Achievement [1] 95/25 achieving [1] 173/18 acknowledge [1] 227/6 acknowledged [6] 39/5 157/7 172/6 185/7 186/7 193/1 acknowledges [6] 42/2 147/16 158/21 163/4 172/11 216/16 acknowledging [1] 186/2 across [23] 11/8 16/24 51/12 72/24 74/3 121/19 150/22 151/14 152/1 164/1 166/1 170/21 173/8 175/15 180/20 180/21 187/16 187/22 187/23 188/2 188/10 188/14 217/15 across-time [1] 51/12 act [1] 121/23 action [10] 14/8 44/8 46/22 47/4 47/9 185/16 216/6 216/19 216/20 216/23 actions [1] 76/4 active [11] 24/18 25/5 25/5 25/19 25/25 26/5 28/6 28/12 37/15 91/15 92/7 activities [1] 111/9 actual [11] 28/16 51/17 81/9 149/2 149/22 151/12 151/19 154/22 168/5 179/12 184/8 actually [75] 4/14 9/4 9/5 12/24 12/25 13/2 13/19 13/23 15/4 19/14 19/17 23/12 23/22 30/9 30/24 31/9 32/21 33/8 34/3 35/8 35/15 35/24 37/23 38/6 40/8 42/1 42/6 42/14 45/6 47/16 48/6 52/7 54/16 56/6 56/23 57/2 61/8 61/18 64/12 65/23 69/23 74/1 75/17 77/14 79/23 80/22 83/14 87/11 95/14 100/12 118/10 119/11 120/2 121/8 128/4 146/21 147/25 148/16 154/12 154/21 158/11 161/24 162/17 164/9 167/1 168/2 172/8 172/13 172/21 182/6 185/21 188/3 198/6 203/6 222/20 | ADAM [1] 1/12 adapt [2] 37/9 114/19 adapted [2] 21/17 21/12 add [3] 92/9 123/19 185/13 added [1] 34/7 adding [1] 217/9 addition [3] 54/4 193/25 200/15 additional [4] 93/16 162/13 199/12 200/16 additions [1] 170/4 address [9] 24/11 142/5 148/4 174/11 174/25 227/7 227/13 227/23 227/24 addressed [5] 174/8 186/6 212/12 227/8 227/9 addresses [1] 42/12 addressing [1] 143/6 adds [1] 163/1 adjacent [1] 76/18 adjoined [5] 132/15 132/17 232/7 232/10 232/11 adjust [1] 185/17 admiral [24] 2/7 88/24 89/9 89/24 90/6 91/22 102/22 104/23 105/8 105/20 106/4 108/11 116/17 118/1 118/5 118/14 119/3 123/8 123/24 124/5 127/4 127/9 127/14 132/6 admiral's [1] 122/24 admirals [3] 129/10 129/12 130/25 admission [20] 146/23 148/15 152/2 152/7 152/10 152/24 153/4 153/8 156/5 159/3 159/19 169/8 171/10 171/10 171/11 180/11 183/23 213/8 216/7 216/20 admissions [85] 1/3 1/21 42/12 42/19 42/23 56/12 83/2 85/5 123/11 141/11 141/16 142/1 147/14 147/22 149/2 149/7 151/21 152/4 152/5 153/12 156/9 156/11 156/18 156/23 157/11 164/20 165/2 165/4 165/18 168/20 169/5 170/1 170/5 170/11 171/2 171/7 172/7 172/8 172/9 172/18 173/9 173/12 173/19 174/18 174/22 175/3 175/13 177/4 178/5 178/17 181/13 181/24 184/6 184/8 184/16 186/11 187/5 187/19 207/13 207/18 207/20 208/19 208/21 213/13 214/2 214/20 214/23 214/24 215/8 215/23 216/6 216/12 217/10 218/13 220/7 220/8 220/10 220/21 220/23 220/23 222/4 222/25 223/24 226/18 226/19 admit [10] 146/21 170/18 170/19 173/2 173/21 215/18 217/21 218/6 218/22 219/4 admits [3] 183/18 210/3 210/4 admitted [6] 108/6 146/11 163/2 182/23 186/10 218/18 admitting [1] 43/18 adopted [3] 84/22 141/21 169/17 adoption [2] 138/13 149/19 advanced [1] 136/12 advancement [1] 44/2 advancing [1] 47/10 advantage [7] 15/22 16/15 17/16 104/1 106/24 121/3 180/14 advantages [4] 17/19 17/20 19/5 21/2 adverse [7] 21/16 33/21 33/23 34/10 35/10 165/7 165/10 advice [1] 119/1 advisors [1] 32/11 advocating [2] 131/5 131/6 affairs [1] 43/9 affect [17] 12/22 16/13 20/1 27/13 28/20 36/9 37/14 79/9 85/17 87/9 87/11 88/10 90/14 133/2 141/16 170/25 215/8 affecting [1] 134/11 affects [2] 54/10 171/11 affirmative [5] 44/8 46/22 47/3 47/9 185/16 Afghan [2] 48/24 49/3 Afghanistan [8] 29/25 37/4 37/7 38/11 38/18 48/21 76/5 77/21 Africa [4] 34/15 35/2 46/17 64/24 African [28] 35/25 45/15 46/11 46/21 46/24 48/11 49/14 49/16 64/7 64/22 66/12 66/15 66/16 66/23 82/15 83/23 84/4 84/6 84/12 109/4 113/20 114/9 117/19 221/15 221/16 221/24 221/24 222/1 African-led [1] 66/16 after [18] 14/8 35/25 80/3 82/13 93/16 94/4 94/6 94/10 129/9 129/10 135/7 135/10 139/14 163/3 185/25 203/17 214/17 229/13 after-action [1] 14/8 afternoon [8] 89/24 123/8 123/9 132/19 |
| 6 | 6 percent [1] 183/18 60 [1] 56/14 61 [1] 55/22 65 percent [3] 174/15 174/20 227/16 66 [3] 102/19 102/20 108/8 66 percent [1] 7/16 661 [1] 72/22 67 [1] 108/9 | |
| 7 | 7,000 [1] 97/8 70 [1] 129/11 700 [1] 91/14 73 percent [1] 30/5 75 [2] 24/24 53/10 75 percent [1] 7/18 753 [1] 233/7 7th [2] 93/18 100/24 | |
| 8 | 80 percent [1] 4/20 825 [1] 88/13 867 [2] 63/6 63/6 872 [2] 54/18 54/19 873 [1] 46/4 874 [2] 61/11 63/6 874.1 [1] 63/5 878 [3] 215/2 216/4 225/7 89 [1] 2/8 895 [1] 5/19 | |
| 9 | 9,233 [1] 181/1 92 [2] 128/3 128/4 | |
| A | a.m [3] 1/7 3/1 89/5 ability [12] 17/5 21/2 37/20 48/25 82/17 83/25 99/23 101/25 115/1 116/6 116/9 141/16 able [17] 20/24 21/8 23/9 29/17 38/21 111/22 112/3 112/5 114/18 117/4 117/9 141/2 200/21 202/2 228/12 231/4 231/11 aboard [1] 57/10 about [193] 3/17 3/21 7/9 7/12 7/22 11/2 12/9 12/13 14/17 14/23 17/18 18/21 18/21 19/6 19/25 20/19 24/19 25/12 25/19 26/14 28/5 28/8 28/16 28/19 29/3 29/5 30/4 30/7 30/21 30/25 31/4 31/19 32/25 37/21 38/4 38/8 38/13 39/19 39/24 40/7 41/12 41/23 42/19 42/21 44/14 45/2 45/5 45/8 45/9 46/20 48/15 49/21 51/18 54/25 55/7 55/14 55/18 56/6 56/9 56/17 57/16 58/8 59/18 59/20 60/4 60/13 60/22 60/23 61/2 61/21 61/23 64/6 64/13 64/16 65/5 66/7 67/21 68/6 69/17 74/25 79/8 79/12 81/17 82/9 84/22 85/3 85/12 86/21 87/18 88/6 93/6 93/13 96/3 97/5 97/7 100/2 101/14 101/15 102/11 103/22 104/12 105/1 105/15 107/5 109/1 110/1 112/20 113/13 114/8 114/24 116/2 116/17 120/25 125/13 125/14 125/23 128/2 131/7 137/4 138/3 138/20 141/23 141/23 142/11 142/23 149/25 150/10 153/9 153/15 154/4 156/14 158/6 159/13 159/18 161/4 161/7 161/21 162/8 163/8 163/11 163/12 163/13 163/24 163/25 167/8 170/17 173/25 174/1 174/14 180/12 181/23 182/12 183/10 183/20 185/5 185/10 187/6 188/20 188/25 189/15 190/13 192/3 193/5 204/13 204/16 204/20 204/24 205/7 205/8 205/9 205/14 206/4 206/6 206/16 207/5 208/18 209/9 211/21 212/12 212/22 215/6 216/15 218/16 218/17 219/13 220/1 221/23 225/12 225/16 225/20 226/22 228/7 231/8 | |

afternoon. [1] 13/22 130/22 88/1
188/20

afterwards [1] 117/18

again [68] 3/23 7/15 7/20 9/7 9/10 9/24
10/4 11/6 15/20 17/25 18/6 18/14 19/13
27/23 27/23 29/8 30/6 30/8 32/24 32/25
33/3 33/5 33/18 38/10 38/21 40/3 40/4
40/23 43/3 50/25 55/8 68/12 75/7 88/3
95/13 105/15 105/16 106/7 106/9 107/14
107/22 112/15 114/1 115/5 116/14 118/5
118/24 125/16 127/9 128/13 151/17 152/20
154/6 154/15 156/6 160/8 163/1 163/9
175/20 187/21 189/11 194/19 197/17
210/23 218/4 227/4 230/1 231/13

against [18] 4/23 6/11 6/14 6/25 9/14
16/2 22/23 37/19 63/14 63/19 67/9 72/8
81/5 113/21 171/24 171/25 214/20 222/25

aggregate [1] 218/25

ago [5] 102/1 117/16 138/3 208/12 224/22

agree [39] 42/11 42/13 43/1 43/7 43/18
44/22 49/7 49/25 56/22 57/25 64/14 68/8
68/13 69/20 71/6 74/7 77/9 77/23 78/2
78/10 79/4 83/22 104/23 106/4 107/18
124/22 152/7 152/10 153/11 157/1 158/2
165/6 167/4 168/13 170/11 179/11 186/18
206/15 219/4

agreed [11] 50/15 160/7 170/20 183/6
194/16 194/17 194/23 195/8 205/8 205/10
208/15

agreeing [1] 59/4

agreement [7] 43/17 157/14 170/17 194/20
202/2 202/4 204/17

agrees [3] 157/9 157/18 165/9

ahead [5] 43/23 86/15 123/4 189/8 197/6

air [14] 76/25 77/2 94/22 97/2 97/4 98/5
98/12 98/16 98/18 99/6 99/24 100/7
102/11 131/10

aircraft [2] 92/20 97/2

airline [1] 139/11

airlines [1] 138/20

AL [1] 1/6

Alaska [1] 176/14

alienated [1] 48/1

all [127] 4/11 6/2 8/11 10/3 15/4 19/10
20/10 21/24 22/8 23/4 24/12 26/23 32/23
42/1 46/4 48/9 48/19 50/17 50/22 52/11
53/4 54/13 56/13 59/18 60/4 60/13 61/15
65/5 69/11 70/24 71/3 72/17 73/4 74/23
78/25 82/12 82/14 83/18 83/22 85/3 86/6
87/10 87/17 87/23 89/2 89/3 89/6 91/6
92/7 93/1 93/1 95/1 97/13 97/17 99/19
101/20 104/3 105/3 106/20 106/23 110/10
110/10 112/13 114/4 114/8 115/7 117/13
119/9 120/2 120/11 120/14 121/9 123/14
127/14 127/24 130/25 131/8 131/22 132/6
132/16 132/19 135/3 141/21 141/22 144/18
146/25 146/25 147/5 147/17 148/22 158/25
161/11 169/19 176/7 176/22 177/11 177/15
181/17 182/8 185/1 185/18 189/1 190/20
192/14 192/18 194/7 197/6 197/23 203/17
210/19 210/22 210/24 211/23 212/12
212/13 213/22 215/23 217/4 221/14 221/23
226/16 227/25 228/5 228/14 230/23 232/8
232/9

all-volunteer [1] 117/13

allegation [2] 222/13 223/8

alleged [1] 26/14

Allied [1] 72/8

allies [1] 35/5

allow [4] 23/25 75/13 185/17 201/8

allowed [4] 49/3 70/3 70/12 204/8

ally [1] 35/6

almost [5] 10/7 33/14 152/19 153/7 188/7

alone [3] 68/14 115/10 208/4

along [4] 9/16 12/1 13/19 54/2

already [11] 24/24 28/11 128/15 146/10
159/12 160/8 165/21 211/7 211/12 211/16
212/16

also [88] 1/21 8/22 9/1 14/12 16/9 18/10
21/5 23/3 24/15 32/13 37/12 39/20 41/15
42/6 44/3 47/23 48/15 62/15 64/6 66/11
67/20 68/25 69/11 69/12 72/6 74/13 78/22
87/17 88/6 91/3 91/18 92/24 93/17 94/8
94/14 94/24 98/1 99/7 100/16 106/13
107/10 108/17 110/11 111/15 114/22
117/20 118/14 118/19 118/23 119/23
119/24 121/2 121/21 122/2 123/3 123/23
136/11 136/12 138/2 142/2 148/22 150/3
150/7 151/2 155/21 159/8 160/22 162/10

164/11 165/3 165/9 166/4 167/10 167/12
169/6 172/15 173/23 176/3 187/5 200/16
204/12 209/15 209/16 210/17 210/17
218/7 218/11
alter [1] 183/16
alternative [9] 10/12 10/16 63/17 79/8
82/1 136/24 178/10 178/23 178/25
alternatives [3] 137/4 137/19 143/18
although [4] 65/23 68/24 177/19 182/4
Altonji [2] 160/17 162/3
alumni [1] 203/15
always [4] 111/9 111/10 111/17 140/4
am [7] 48/6 61/9 90/20 97/23 109/5
126/17 188/23
ambassador [1] 84/12
ambassadors [1] 120/3
ameliorate [6] 208/22 209/8 209/14
210/14 210/18 210/21
ameliorative [1] 212/17
amenable [4] 156/8 159/25 167/25 168/16
America [8] 69/21 81/13 83/6 104/18
106/20 106/21 106/24 164/5
American [26] 11/19 14/25 32/12 35/24
35/25 37/7 49/14 69/18 82/16 83/24 84/4
84/6 84/12 109/4 113/20 116/6 117/20
120/13 122/2 144/25 144/25 176/14 221/15
221/24 221/24 222/1
American/Black [1] 35/25
Americans [25] 15/9 74/8 74/10 74/16
74/18 74/20 82/15 82/15 83/23 83/24
86/23 114/9 120/6 120/7 120/8 120/10
120/18 164/12 164/13 165/7 165/10 176/16
179/17 221/16 221/21
among [14] 21/7 22/14 22/17 24/18 51/18
54/2 57/7 62/4 75/8 85/22 164/7 171/8
176/7 181/17
amount [9] 35/23 147/21 148/19 154/7
154/8 179/19 195/18 230/3 230/5
amphibious [3] 92/25 93/18 100/24
amphibs [1] 92/25
analogous [6] 36/8 36/13 36/16 39/6 39/8
60/4
analyses [1] 182/24
analysis [55] 3/22 5/9 8/4 9/6 43/14
45/12 45/13 53/24 70/17 74/22 77/4 78/15
78/20 88/10 135/22 136/16 136/23 139/25
140/1 140/3 140/10 141/2 143/2 144/11
145/6 145/7 152/6 156/8 158/3 159/25
162/20 168/1 168/16 170/7 182/11 182/13
182/14 182/15 182/20 182/22 182/23
182/23 183/8 183/9 183/12 183/13 185/15
186/9 188/11 197/14 204/13 212/5 213/9
217/5 225/11
analytical [2] 136/4 159/1
Analytics [1] 25/7
analyze [3] 136/5 140/6 157/8
analyzed [1] 137/9
ancient [1] 17/12
ANDERSON [1] 1/15
ANDREW [1] 1/18
anniversary [1] 203/6
annual [1] 11/20
anonymous [1] 206/22
another [17] 16/2 17/11 23/2 25/8 37/15
93/14 117/25 120/1 120/25 125/3 161/15
170/19 180/12 180/15 198/10 200/4 222/9
answer [8] 64/20 65/2 159/21 190/23
193/8 206/1 206/13 225/25
answered [3] 65/1 90/9 205/10
answers [1] 26/24
antagonisms [1] 19/13
anticipate [2] 196/9 229/22
anticipating [1] 229/18
antisubmarine [1] 100/11
any [88] 12/22 19/19 28/7 31/24 35/10
45/12 47/13 48/9 48/13 49/10 49/13 50/8
57/13 67/8 67/12 67/23 68/9 69/25 70/7
71/2 75/13 77/6 77/12 85/4 85/7 85/12
85/16 85/20 85/22 85/25 86/7 88/17 95/12
99/16 102/9 112/18 113/5 113/10 115/16
117/14 120/23 124/18 126/17 126/20
126/23 131/5 131/13 131/23 135/17 136/6
138/8 140/24 141/10 141/13 143/7 144/13
144/24 145/21 150/22 151/12 161/17 166/7
176/6 176/12 176/17 176/22 176/22 177/14
180/14 180/22 186/9 195/20 199/1 199/8
199/12 199/17 200/1 201/12 204/10 219/18
220/22 225/25 226/4 227/5 228/3 229/18
229/21 230/14
anybody [2] 49/10 91/20

anybody's [1] 49/8
 anyone [7] 42/16 42/18 88/20 91/15 124/5
 anything [22] 10/17 12/4 12/24 42/21
 44/25 79/1 96/5 97/9 97/18 125/23 131/25
 132/3 152/3 154/4 155/6 155/20 183/10
 201/15 205/17 220/21 231/22 232/1
 anyway [1] 133/1
 anywhere [1] 79/22
 apart [2] 36/20 199/13
 apologize [1] 48/5
 apparent [1] 201/25
 apparently [5] 195/19 196/16 201/5 201/6
 201/13
 appear [2] 8/5 69/16
 appearing [1] 8/23
 appears [3] 56/8 193/3 223/9
 appendix [5] 62/25 63/2 63/5 63/7 63/13
 Appendix A [3] 62/25 63/2 63/5
 applicant [16] 156/21 166/17 171/11
 173/16 173/23 175/7 176/6 176/7 177/5
 177/6 182/1 184/6 184/10 185/18 188/25
 221/18
 applicant's [1] 218/24
 applicants [58] 43/23 43/24 150/7 150/16
 150/21 150/22 150/24 151/23 151/25
 153/10 154/13 159/8 164/10 164/23 165/14
 171/9 171/12 171/24 172/20 175/5 176/10
 176/18 177/9 177/10 177/19 177/20 178/9
 178/11 178/20 179/16 180/5 180/20 180/21
 180/24 180/25 181/2 181/3 181/5 181/5
 181/16 181/17 181/18 181/22 181/23
 181/24 186/16 187/1 187/7 187/24 187/25
 188/7 210/25 211/11 220/15 221/23 221/24
 221/25 222/2
 applicants' [1] 154/9
 application [5] 135/21 150/23 162/17
 174/21 207/19
 applications [1] 154/9
 apply [4] 140/1 140/7 140/8 203/9
 applied [5] 90/23 91/10 115/1 119/1 157/7
 applying [1] 142/19
 appointments [3] 171/9 172/22 215/11
 approach [11] 18/10 63/20 75/8 106/2
 162/11 162/23 163/2 163/5 171/20 185/3
 185/9
 appropriate [1] 226/20
 Appropriations [1] 105/13
 approved [1] 121/9
 approximately [1] 144/4
 approximates [1] 37/2
 Arabian [1] 121/1
 arbitrarily [2] 150/7 220/14
 arbitrary [2] 176/5 177/17
 Arcidiacono [91] 145/6 147/15 148/3
 148/7 149/23 150/6 151/11 151/22 153/7
 153/12 153/22 153/24 154/11 154/18
 155/15 155/18 156/1 156/10 157/1 157/7
 157/14 158/2 158/11 159/1 160/2 160/15
 160/25 162/7 162/10 162/25 163/5 164/9
 165/6 165/20 165/22 166/4 166/14 166/18
 167/5 167/9 167/19 168/3 168/6 168/13
 169/16 170/11 170/19 170/23 171/16 172/3
 172/11 172/23 173/10 174/8 174/11 174/24
 175/9 177/18 177/23 178/1 179/7 179/11
 180/1 180/22 181/11 182/4 182/10 182/19
 183/4 183/15 184/15 185/7 185/9 186/1
 186/7 186/18 205/21 207/8 207/25 208/7
 208/11 209/19 211/6 212/15 213/12 216/16
 220/9 220/14 227/6 227/10 227/23
 Arcidiacono's [35] 145/9 147/10 147/12
 148/15 148/17 149/4 150/5 150/14 151/3
 151/4 152/14 154/10 155/7 155/12 156/6
 157/21 158/8 158/14 158/17 159/18 163/21
 168/12 168/24 169/7 171/20 175/22 175/25
 178/21 184/18 207/13 211/14 212/4 212/11
 213/7 215/7
 are [253]
 area [7] 37/15 43/9 59/21 62/15 97/16
 112/4 132/10
 areas [12] 36/20 38/5 38/5 38/22 38/24
 95/10 95/10 95/12 95/22 130/8 130/8
 144/10
 aren't [1] 130/9
 argument [5] 12/6 38/20 225/14 225/15
 231/16
 arguments [1] 67/15
 arise [1] 80/16
 Arleigh [1] 96/14
 armies [22] 3/18 7/8 7/12 7/18 7/19 8/15

| | | |
|--|--|--|
| A armies... [6] 9/23 10/14 17/12 30/14 16/1 16/3 16/24 17/11 19/17 19/21 30/14 39/19 40/8 41/15 78/7 88/8 arms [1] 16/6 army [67] 3/24 4/3 4/6 4/18 4/20 5/4 5/5 6/5 6/6 6/9 6/10 6/16 6/19 6/22 6/25 7/4 7/11 8/11 8/19 9/9 9/13 9/17 9/20 10/1 10/8 13/5 13/12 13/23 13/25 14/9 14/14 15/2 16/17 16/19 18/24 20/12 31/21 35/17 38/17 45/4 45/15 49/3 68/22 69/6 70/4 70/8 70/10 70/13 70/16 71/7 71/16 71/23 72/2 75/1 75/1 75/2 77/20 98/5 98/10 99/6 102/12 123/24 123/25 124/1 129/3 129/9 131/10 army's [2] 4/2 48/24 Army-Navy [3] 123/24 123/25 124/1 around [7] 32/6 91/14 94/11 95/11 132/10 138/2 202/24 array [3] 114/16 114/18 114/20 arrest [2] 15/3 15/8 art [1] 155/22 article [13] 45/22 45/22 45/25 46/6 46/8 61/20 160/19 162/25 163/1 163/4 163/15 163/16 186/2 articles [2] 12/3 61/12 artificial [2] 176/4 178/24 artillery [1] 16/4 as [263] ashore [4] 97/10 97/12 98/15 120/4 Asian [5] 25/22 74/18 82/15 83/23 179/17 Asians [2] 176/17 176/17 aside [1] 208/11 ask [11] 15/23 28/16 55/8 59/18 60/13 64/25 68/11 123/16 127/12 142/6 196/4 asked [15] 12/16 12/25 64/17 86/20 87/17 88/6 102/11 135/5 160/6 194/5 205/3 205/7 205/8 205/9 205/25 asking [5] 51/1 56/25 206/4 206/6 212/22 asks [1] 24/19 aspect [3] 20/7 48/24 106/25 aspects [3] 10/14 19/22 226/25 assault [2] 66/21 92/25 assess [10] 32/8 82/10 101/4 138/25 145/6 161/8 182/11 182/16 212/24 225/4 assessed [1] 187/21 assessing [5] 138/11 142/20 142/21 147/13 173/2 assessment [3] 11/1 115/16 204/24 asset [1] 105/2 assign [6] 4/13 4/15 5/23 31/5 31/15 31/17 assigned [5] 5/1 31/20 31/22 150/7 177/11 assigning [1] 32/22 assignment [5] 145/5 176/4 177/17 178/24 225/3 assignments [1] 140/24 assigns [1] 220/15 assistant [1] 94/4 associate [1] 67/6 associated [1] 8/21 association [4] 11/20 67/8 144/25 145/1 associations [1] 144/24 assume [21] 31/3 49/10 49/14 66/8 77/9 77/15 90/16 124/5 124/9 124/13 124/17 125/3 125/11 125/20 125/21 160/21 161/10 163/13 171/23 202/24 209/13 assumes [4] 149/20 169/22 184/15 184/24 assuming [1] 172/4 assumption [26] 84/22 115/22 124/12 124/15 125/15 125/24 149/21 159/7 159/7 160/7 160/9 160/10 160/12 160/14 160/20 161/8 162/2 162/5 162/8 162/21 163/10 169/20 172/6 172/11 172/12 175/15 assumptions [12] 30/21 30/25 139/1 139/6 143/11 161/1 169/16 170/8 184/1 186/15 187/6 215/7 atomic [1] 77/6 atrophy [1] 47/23 attack [2] 200/21 201/11 attempt [2] 101/16 162/7 attempted [1] 172/25 attend [2] 134/5 135/9 attended [1] 135/10 attention [1] 201/21 attenuation [1] 166/20 attitude [1] 38/7 attitudes [1] 24/18 attract [1] 105/23 | attributable [3] 148/22 153/9 155/4 attribute [1] 165/17 attributed [1] 114/22 151/7 158/18 163/7 attributes [8] 154/12 154/13 166/17 167/21 179/8 184/10 184/21 185/18 attributing [2] 152/17 168/3 attribution [1] 167/18 attrition [1] 128/14 attuned [1] 110/17 audit [1] 10/23 authorities [3] 82/21 83/7 99/5 authority [1] 122/17 auxiliary [1] 17/6 available [2] 32/2 222/4 average [14] 9/22 75/2 110/23 164/13 166/4 166/5 166/6 167/12 178/2 178/8 178/14 178/20 179/2 182/22 aviation [2] 92/21 98/12 avoid [2] 18/9 133/1 awarded [1] 135/11 awards [5] 11/18 95/21 95/21 95/24 96/4 aware [2] 50/8 72/15 away [7] 8/14 21/3 159/20 208/5 208/10 212/9 212/13 axis [3] 9/16 9/17 9/19 B bachelor's [1] 135/6 back [49] 8/14 13/9 13/24 15/10 15/18 21/13 31/14 32/24 33/18 36/6 49/19 49/19 56/13 56/13 57/5 58/10 60/2 60/2 67/19 71/22 73/4 74/25 80/4 88/21 101/1 102/4 111/2 112/15 119/8 123/3 128/17 132/10 132/11 134/19 134/25 136/21 148/24 153/11 154/15 182/21 196/6 202/13 203/19 204/2 205/12 207/23 216/3 221/14 228/8 background [6] 46/9 46/10 90/18 138/8 141/6 168/11 backgrounds [2] 104/22 217/23 backing [1] 122/13 backup [3] 195/7 195/20 195/21 badge [2] 97/20 97/20 balance [1] 130/19 balancing [9] 151/9 187/12 187/14 187/20 222/11 222/14 223/3 223/9 223/13 ballistic [1] 100/10 Baltimore [1] 1/6 ban [1] 185/16 Bancroft [1] 126/5 band [16] 71/7 71/20 71/21 71/23 72/2 75/5 75/16 75/20 78/3 78/6 78/8 84/25 85/2 110/18 110/21 112/15 bands [4] 33/4 33/12 71/7 83/11 Bangladesh [1] 64/3 bar [7] 153/3 153/5 154/6 178/19 178/22 178/23 209/14 barely [1] 14/10 base [3] 56/23 59/7 99/18 based [25] 81/3 98/10 98/11 101/12 107/3 118/9 125/12 126/4 126/11 126/17 126/19 126/20 126/23 126/25 136/23 147/19 156/9 161/14 161/18 162/20 164/1 186/24 188/11 210/15 212/25 bases [1] 16/16 basic [3] 6/16 68/22 137/12 basically [9] 4/17 5/22 12/12 14/7 27/17 32/10 41/18 74/4 130/4 basis [13] 17/14 46/13 49/14 158/14 159/6 160/10 160/13 162/5 164/18 171/10 187/18 206/12 208/4 battalion [2] 94/3 102/12 battalions [1] 46/13 batteries [1] 24/19 battle [4] 4/3 4/21 77/25 87/2 battlefield [36] 3/20 6/3 7/22 8/3 8/13 8/16 10/6 10/11 13/12 15/13 16/6 16/13 17/21 17/23 18/4 18/5 18/16 19/22 20/1 20/8 21/20 21/22 22/10 23/9 23/10 23/20 33/22 34/1 35/5 36/4 68/10 68/15 68/18 78/8 78/11 85/18 battles [6] 3/18 13/3 76/13 76/18 76/25 88/8 BCA [1] 151/23 be [196] 5/1 5/5 6/19 8/18 8/23 10/1 12/4 13/10 13/10 16/4 18/9 19/24 22/22 23/8 23/10 24/15 27/10 28/17 29/17 30/20 30/22 32/22 32/24 32/25 35/6 35/8 36/22 37/17 40/2 40/4 41/8 50/13 51/16 52/3 52/20 54/18 57/2 58/1 59/2 59/5 59/8 60/6 65/18 65/20 66/2 66/24 67/5 67/17 | 69/8 70/6 70/15 70/19 70/23 71/8 73/18 73/19 73/20 74/5 74/7 76/9 76/11 77/3 79/13 79/18 82/21 83/21 86/13 87/13 87/15 88/4 89/6 89/11 99/15 99/20 99/23 100/3 100/8 100/14 100/16 101/25 102/10 102/15 103/16 103/18 105/4 105/15 108/1 111/4 111/10 111/16 111/16 111/17 113/6 113/22 115/7 115/8 115/8 115/24 117/1 117/4 117/9 117/23 119/10 119/12 119/12 119/12 119/17 119/21 121/20 121/23 122/23 124/22 124/22 125/6 125/7 125/7 125/11 125/18 128/5 130/22 130/22 130/25 130/25 131/9 131/15 132/19 145/23 145/24 146/21 147/5 148/21 153/8 154/1 154/8 156/7 159/9 159/19 160/1 160/3 160/9 161/5 161/22 161/24 162/18 164/5 165/6 165/14 165/17 168/22 170/8 174/6 175/18 177/6 177/15 179/14 182/24 183/13 184/11 185/21 186/10 186/15 186/21 189/4 192/9 193/3 194/5 195/17 195/25 196/2 200/6 200/18 208/21 208/22 209/14 209/24 210/8 210/25 212/8 212/19 212/20 213/9 216/8 216/8 216/14 226/18 226/19 227/8 228/12 228/21 229/6 229/20 229/23 230/6 231/3 231/5 bears [1] 221/4 became [4] 35/21 74/2 95/3 112/23 because [91] 12/24 14/2 14/3 26/4 32/18 37/2 39/4 49/16 51/5 51/15 60/7 67/3 68/25 69/24 69/24 70/12 75/7 81/1 82/3 86/9 88/3 91/9 97/6 100/11 101/22 101/23 102/9 109/19 111/18 113/25 114/8 117/5 117/6 117/7 119/20 120/3 120/6 122/8 125/20 125/22 126/6 127/1 138/4 140/5 141/20 142/19 148/19 149/10 150/21 152/19 154/3 155/1 155/14 156/6 157/15 158/16 158/20 159/15 159/24 166/14 168/13 170/8 173/20 175/16 177/8 177/13 177/14 180/19 181/11 181/17 183/1 185/21 186/14 187/3 187/5 188/2 200/3 200/8 202/1 208/7 211/6 211/23 212/8 212/15 213/6 215/8 215/11 218/22 219/25 220/1 228/15 Becerra [1] 84/19 become [5] 8/22 36/1 70/21 99/18 118/10 becomes [2] 6/17 173/23 becoming [1] 36/21 beds [1] 215/15 been [52] 11/16 11/17 11/22 11/25 12/4 16/24 17/11 20/19 22/14 23/13 27/2 34/6 35/20 38/10 38/17 42/14 43/23 47/4 66/18 87/24 92/7 95/14 100/21 110/11 119/10 121/1 123/25 128/10 128/15 129/6 134/1 134/2 138/2 139/20 144/1 144/10 144/18 144/21 145/16 146/3 146/7 146/24 147/1 150/18 152/19 173/22 194/10 198/9 201/13 208/25 214/5 225/6 before [24] 1/9 42/9 42/16 88/21 96/8 100/5 102/4 102/22 105/8 105/12 115/8 121/7 123/11 126/9 142/24 143/22 147/9 184/19 194/11 194/14 214/6 225/16 228/8 232/4 begin [7] 8/8 9/5 40/25 180/19 182/18 183/24 187/3 begins [2] 8/12 13/21 behalf [3] 1/12 1/17 144/19 behavior [2] 65/19 139/12 behavioral [1] 65/14 behaviors [9] 6/19 8/13 8/19 8/21 8/22 9/8 10/6 10/8 10/11 behind [2] 14/5 217/5 being [33] 17/1 20/24 38/13 38/21 51/7 66/24 67/4 72/25 78/3 84/22 87/9 87/10 93/5 94/2 98/8 100/17 114/22 120/1 126/12 136/20 150/19 158/13 166/10 168/15 171/19 173/3 175/14 180/24 182/9 196/16 200/21 211/16 229/12 belief [2] 22/8 43/22 beliefs [1] 85/18 believe [60] 11/25 16/14 20/14 38/5 39/14 39/20 40/2 40/7 44/19 45/15 47/16 48/5 48/18 49/13 49/21 51/18 51/23 52/14 53/1 53/2 53/14 54/12 61/3 61/10 64/11 65/5 65/7 65/20 66/2 66/9 68/2 69/23 71/14 71/15 72/22 72/24 73/2 73/14 78/6 79/24 80/10 81/24 84/10 88/12 88/24 103/24 116/18 118/15 119/3 128/4 148/17 148/25 149/1 149/6 155/12 158/10 171/2 197/10 215/18 226/20 believed [1] 186/21 |
|--|--|--|

| | | |
|---|---|--|
| B | body [1] 217/22 | 44/8 44/13 44/20 46/5 48/20 52/7 54/17 55/21 57/25 58/8 59/10 60/1 62/18 63/9 67/18 68/1 69/1 70/1 71/1 72/1 73/4 74/7 77/24 78/1 80/2 80/16 89/12 89/15 93/1 97/7 98/17 103/17 104/19 105/4 106/11 106/21 106/23 108/1 110/9 110/15 112/20 118/7 118/10 118/20 119/11 119/12 119/12 119/17 123/16 132/9 132/12 133/1 134/17 134/21 138/16 140/11 140/18 150/11 151/17 152/1 152/20 153/8 154/4 154/8 155/9 155/11 156/7 159/1 161/10 161/11 163/20 164/5 169/2 169/12 174/6 174/24 175/20 177/5 177/20 177/25 179/23 181/8 181/22 182/24 184/12 186/14 189/17 192/8 194/9 197/24 198/3 198/18 203/19 209/16 212/2 214/7 216/7 216/8 228/6 230/23 |
| believes [1] 159/5 | Bolsheviks [2] 35/21 35/22 | can't [23] 99/16 99/18 109/20 115/23 125/1 128/17 128/18 132/21 133/3 144/4 168/10 169/25 187/3 209/10 209/12 215/17 215/18 215/25 219/24 223/5 224/4 224/5 225/25 |
| believing [1] 22/11 | bomb [1] 77/6 | candidate [10] 109/23 161/10 170/18 170/19 173/2 177/18 180/11 180/12 217/9 219/8 |
| bell [2] 134/13 134/22 | bonds [4] 23/12 23/25 24/4 86/2 | candidates [16] 109/22 149/11 152/8 153/4 153/5 161/12 161/14 162/17 173/3 174/7 174/20 176/4 178/24 181/10 220/17 227/4 |
| belong [1] 176/12 | bonus [6] 18/1 21/4 44/17 44/21 44/24 50/17 | cannot [11] 19/4 48/5 49/10 148/21 160/1 160/3 160/9 168/22 170/8 175/18 208/21 |
| belonging [1] 175/7 | bonuses [1] 18/22 | canon [1] 16/25 |
| below [10] 6/5 7/6 7/7 7/9 7/13 7/19 9/10 14/20 44/23 71/16 | book [12] 11/11 12/5 13/1 22/20 30/14 41/15 42/2 42/7 45/9 68/17 80/22 114/7 | capabilities [1] 77/20 |
| bench [2] 200/8 200/12 | born [3] 15/5 15/7 15/9 | capability [1] 105/23 |
| benefit [2] 115/25 116/8 | borrowers [1] 204/22 | capable [1] 198/2 |
| benefits [1] 44/14 | both [20] 24/18 33/2 39/1 39/14 50/23 60/25 97/25 108/9 108/17 119/5 124/22 147/2 155/19 158/2 194/17 226/25 228/25 229/3 229/12 230/7 | capacity [8] 182/15 183/7 183/9 183/11 185/15 186/2 211/21 212/4 |
| BENNETT [1] 1/9 | bottom [9] 9/13 9/15 9/16 25/11 26/11 52/11 58/9 62/20 216/5 | capital [1] 38/22 |
| Berkeley [1] 213/17 | Bove [2] 67/20 67/23 | captain [13] 96/18 96/19 99/19 129/18 129/19 228/22 228/24 229/6 229/8 229/13 230/8 231/2 231/9 |
| besides [1] 35/11 | box [6] 9/8 9/12 9/15 9/25 26/11 116/6 | capture [2] 71/3 155/7 |
| best [16] 8/12 8/17 38/6 78/8 92/18 104/18 106/11 106/19 107/15 107/15 109/23 112/20 117/8 120/16 202/17 230/19 | boxes [1] 10/4 | captured [1] 80/17 |
| bet [1] 116/5 | BP [1] 8/1 | captures [1] 78/22 |
| better [14] 36/25 49/15 75/17 112/25 113/7 113/7 115/12 115/18 134/15 134/20 189/17 190/17 228/17 228/18 | breach [1] 204/16 | car [1] 132/12 |
| between [39] 3/19 5/5 5/25 10/10 10/25 23/1 23/3 29/18 30/1 33/14 34/13 52/23 62/16 78/15 93/25 97/8 97/14 98/5 98/18 99/2 99/22 110/10 110/15 115/14 124/25 125/25 150/6 154/16 159/22 173/8 176/2 176/3 188/6 194/20 195/16 195/24 203/7 226/17 227/3 | breadth [1] 88/8 | Card [18] 213/16 213/21 213/22 213/24 214/1 214/18 214/19 214/22 218/13 218/20 219/12 219/16 219/23 220/5 225/10 225/22 226/14 227/9 |
| beyond [7] 33/22 33/22 33/23 34/11 35/11 79/5 162/4 | break [11] 23/3 23/6 86/10 86/13 87/7 123/1 125/1 188/20 188/24 230/18 230/21 | Card's [7] 214/10 215/14 215/22 216/4 217/4 217/19 225/8 |
| beyond combat [1] 35/11 | breakdown [1] 42/3 | career [11] 41/4 41/6 92/6 95/5 109/21 112/19 117/14 120/23 142/10 144/15 144/23 |
| bias [30] 62/10 63/14 63/19 67/3 67/5 67/8 154/4 154/16 154/20 155/23 155/25 158/4 158/7 158/8 158/15 159/14 159/18 159/19 163/2 163/21 163/24 168/18 168/22 169/5 207/24 208/8 208/8 208/17 212/10 212/12 | breaking [1] 78/23 | careful [1] 70/15 |
| biased [18] 62/23 64/12 65/18 148/8 148/9 148/16 148/18 149/1 155/13 157/16 157/19 158/22 159/3 159/16 166/25 179/12 183/23 213/11 | BRIAN [1] 1/24 | cares [3] 218/17 219/13 220/1 |
| biases [2] 113/21 114/7 | brief [2] 86/9 125/3 | Carl [2] 94/16 101/10 |
| Biden [1] 190/8 | briefly [4] 3/23 86/8 175/20 201/18 | CARMICHAEL [9] 1/18 2/8 89/7 89/21 103/16 108/9 122/21 131/25 231/3 |
| big [3] 10/14 30/10 125/25 | bring [7] 45/22 48/12 61/11 79/18 100/18 109/20 202/13 | Caroline [1] 226/2 |
| bill [3] 191/10 191/25 196/15 | bringing [2] 81/15 205/14 | carrier [8] 94/15 96/10 96/23 96/24 97/2 97/2 97/7 101/8 |
| billed [7] 190/12 190/19 191/3 191/12 191/14 192/17 194/21 | British [5] 13/13 13/24 14/7 14/10 14/11 | carriers [3] 21/1 21/9 92/20 |
| billet [1] 97/19 | broad [10] 124/12 124/15 124/21 125/14 125/24 140/20 156/15 165/25 166/5 166/15 | carry [4] 18/5 40/8 192/8 201/23 |
| billets [1] 93/10 | broadly [2] 43/11 125/6 | case [84] 15/17 22/19 25/7 27/24 41/13 44/7 47/10 48/10 48/11 53/9 53/15 56/9 66/14 67/16 81/19 86/25 125/12 136/16 136/19 137/4 137/17 138/9 138/14 138/20 141/17 141/24 142/7 142/16 143/8 143/16 143/19 144/21 145/3 145/8 145/13 146/5 147/11 148/1 148/13 149/16 149/19 149/21 150/2 150/15 152/23 153/10 154/18 154/24 161/1 162/14 169/14 169/21 170/20 175/14 175/21 178/5 178/7 178/17 182/3 185/10 186/1 187/24 190/11 190/18 191/2 193/3 193/11 194/11 194/16 200/16 201/12 203/12 203/14 204/10 214/10 214/11 214/20 215/2 216/14 219/13 223/16 226/15 226/24 227/10 |
| billing [6] 193/6 193/25 194/2 195/5 195/17 196/14 | brothers [1] 91/2 | cases [7] 4/12 31/12 39/15 111/19 112/9 142/9 143/17 |
| bills [1] 191/21 | brought [2] 69/18 199/23 | cast [1] 51/14 |
| binary [12] 136/18 136/20 137/1 137/3 137/17 142/23 143/18 214/22 218/13 219/24 225/17 225/20 | BRUCE [2] 1/22 221/8 | caste [2] 45/6 45/7 |
| binder [1] 79/19 | Buck [2] 221/8 222/5 | castes [3] 45/3 51/10 51/11 |
| biological [1] 94/24 | bucket [1] 177/16 | casualties [4] 6/22 7/13 111/11 111/16 |
| bit [23] 12/9 28/5 44/20 45/6 55/21 59/18 60/13 68/6 70/15 75/17 75/22 79/5 81/17 90/18 92/6 104/10 110/1 122/3 134/21 155/9 182/8 203/17 203/18 | build [7] 13/22 23/19 23/24 104/2 104/7 104/17 106/24 | categories [3] 74/4 176/16 220/15 |
| black [69] 25/22 35/25 54/3 54/6 55/23 56/2 56/2 56/3 57/19 58/12 58/18 58/19 58/20 58/25 59/1 70/5 70/7 70/21 73/18 125/4 125/4 129/9 129/10 129/12 131/1 150/22 151/23 152/8 153/5 153/10 154/8 154/13 162/14 162/17 164/9 164/12 165/6 165/10 165/14 167/11 176/8 176/9 177/6 177/7 177/9 177/9 177/10 177/11 178/8 178/12 178/17 178/20 179/16 179/21 180/23 181/3 181/5 181/10 181/13 181/16 181/24 187/24 187/25 188/6 212/7 220/17 220/17 221/21 221/21 | builders' [1] 63/19 | categorization [11] 150/5 175/23 175/25 176/6 176/13 176/23 177/2 177/22 178/10 178/21 178/23 |
| blacks [5] 46/12 47/4 47/11 164/4 221/20 | building [4] 22/16 105/3 105/19 106/7 | categorized [6] 176/9 176/11 176/17 176/18 177/9 177/15 |
| blank [1] 23/14 | builds [1] 14/4 | |
| blend [2] 120/19 178/25 | built [2] 13/11 41/11 | |
| blended [1] 178/12 | bullets [1] 103/10 | |
| blends [1] 220/14 | bunch [1] 41/18 | |
| blocking [3] 6/13 7/24 14/4 | Bureau [1] 164/2 | |
| blow [3] 25/11 26/11 28/17 | Burke [1] 96/15 | |
| blown [1] 9/2 | Burke-class [1] 96/15 | |
| blue [7] 9/22 10/21 36/19 153/3 154/6 178/19 188/5 | Burkina [3] 64/7 64/23 65/2 | |
| BLUM [1] 1/21 | Bush [1] 94/8 | |
| blunder [1] 111/11 | business [1] 140/18 | |
| blunt [2] 210/20 211/3 | busy [2] 123/18 123/19 | |
| board [8] 55/5 55/11 93/17 94/25 100/23 117/9 121/5 121/8 | buy [2] 21/3 165/16 | |
| boarded [1] 121/20 | buy-in [1] 21/3 | |
| boarding [1] 121/6 | | |

| | | | |
|----------------------|---|--------------------|--|
| C | 217/11 217/15 218/7 218/18 218/22 219/4 | 101/8 111/7 | |
| categorized [1] | 220/15 | commands [1] | 96/11 |
| categorizing [1] | 150/10 | Commendation [1] | 152/2 |
| category [8] | 74/5 165/25 177/8 177/11 | Commerce [2] | 190/2 190/4 |
| | 177/12 177/14 177/19 178/11 | commission [1] | 109/15 |
| CATHERINE [1] | 1/18 | commissioned [5] | 92/9 109/18 126/1 126/2 |
| Caucasus [1] | 73/11 | | 126/3 |
| causal [2] | 154/23 168/2 | commissioning [1] | 126/13 |
| cause [1] | 43/24 | commissions [1] | 128/23 |
| causes [2] | 15/2 111/11 | Committee [1] | 105/12 |
| caution [1] | 185/21 | commodore [3] | 94/6 94/11 96/9 |
| cautionary [3] | 161/3 161/9 163/1 | common [10] | 43/17 64/20 65/2 117/11 |
| cautions [2] | 162/3 163/5 | | 163/1 163/5 171/25 172/4 204/25 225/13 |
| central [4] | 16/7 68/18 136/15 143/19 | commonly [3] | 137/10 137/12 137/13 |
| century [5] | 13/10 51/10 51/11 79/3 131/3 | communicate [1] | 142/4 |
| CEO [1] | 128/18 | community [3] | 4/10 92/12 93/6 |
| certain [5] | 19/22 47/10 138/21 154/2 | company [1] | 205/1 |
| | 174/20 | comparable [2] | 59/21 152/8 |
| certainly [5] | 14/16 20/8 73/18 131/17 | compared [3] | 58/20 130/1 181/5 |
| | 201/11 | comparing [1] | 29/12 |
| certainty [1] | 10/7 | comparison [1] | 62/16 |
| CERTIFICATE [1] | 232/13 | comparisons [1] | 26/5 |
| certifications [1] | 99/20 | compatible [1] | 11/4 |
| certified [2] | 95/14 233/4 | compelling [2] | 108/13 110/2 |
| certify [1] | 233/6 | compensated [1] | 201/13 |
| cessation [3] | 85/16 85/21 85/25 | compensation [18] | 63/14 191/23 193/10 |
| Chad [2] | 64/7 65/3 | | 193/17 193/19 193/20 194/1 194/1 199/1 |
| chained [1] | 14/8 | | 199/3 199/8 199/10 199/11 199/22 200/1 |
| challenge [1] | 16/7 | | 200/5 200/17 204/10 |
| challenges [3] | 39/16 104/20 106/18 | compete [1] | 171/25 |
| challenging [3] | 16/11 39/12 115/4 | competing [4] | 20/12 171/24 172/21 173/3 |
| chance [1] | 34/20 | competition [11] | 105/22 171/8 171/22 |
| change [16] | 30/1 30/3 46/17 46/23 73/23 | | 172/15 172/17 172/18 172/24 173/8 226/23 |
| | 88/14 184/7 184/8 184/10 184/16 188/4 | | 227/1 227/12 |
| | 188/6 207/19 207/20 216/17 218/25 | competitive [3] | 103/25 105/25 172/20 |
| changed [6] | 101/12 101/14 101/16 101/17 | competitor [1] | 116/4 |
| | 101/18 216/25 | competitors [1] | 104/1 |
| changes [7] | 59/4 71/2 101/24 111/17 | compiled [3] | 139/12 152/5 224/17 |
| | 185/24 208/22 225/11 | complaints [1] | 22/21 |
| changing [3] | 70/19 113/10 208/19 | complete [2] | 139/4 141/2 |
| characteristic [1] | 173/21 | completed [4] | 42/6 134/6 136/12 143/2 |
| characteristics [10] | 26/14 118/23 159/9 | completely [1] | 168/25 |
| | 160/21 160/23 161/16 173/1 173/5 174/22 | completing [1] | 136/11 |
| | 211/11 | complex [6] | 37/1 38/24 40/6 40/10 104/19 |
| characterization [4] | 99/1 150/18 185/11 | | 106/18 |
| | 187/12 | complexity [5] | 16/10 17/21 39/4 39/11 |
| characterize [1] | 108/24 | | 40/5 |
| characterizing [1] | 156/20 | compliant [1] | 196/17 |
| charged [4] | 192/19 193/4 195/6 204/21 | complicated [2] | 20/9 66/18 |
| chart [6] | 152/1 154/5 154/6 181/21 | component [14] | 25/5 28/14 31/21 39/2 |
| | 187/23 188/5 | | 49/1 98/22 98/23 107/20 107/23 107/25 |
| check [2] | 11/7 129/8 | | 108/23 120/1 122/10 173/22 |
| chemical [1] | 94/23 | components [1] | 99/6 |
| Chicago [1] | 37/22 | composed [1] | 69/6 |
| chief [2] | 93/15 118/3 | composition [22] | 4/6 31/2 31/2 37/25 |
| child [1] | 106/20 | | 62/14 63/22 70/19 115/21 129/21 129/22 |
| Chinese [4] | 74/20 116/5 116/7 116/16 | | 151/5 151/10 182/16 182/25 183/7 183/17 |
| choice [7] | 137/13 137/14 137/15 137/21 | | 184/3 186/10 201/3 201/5 201/7 217/11 |
| | 138/18 168/24 168/25 | compressed [1] | 112/4 |
| choices [1] | 138/20 | conceivable [2] | 208/8 212/13 |
| choose [1] | 229/17 | concentrate [1] | 218/24 |
| CHRIS [1] | 1/20 | concentration [2] | 218/18 220/1 |
| Christopher [1] | 160/17 | concentrations [3] | 164/14 218/23 219/5 |
| chronology [1] | 185/25 | concept [3] | 173/20 180/11 180/13 |
| circles [1] | 9/21 | conceptually [1] | 138/22 |
| circumstance [1] | 97/6 | concern [7] | 125/16 152/25 170/24 185/5 |
| circumstances [5] | 83/6 95/17 99/16 165/7 | | 186/6 227/7 227/10 |
| | 165/11 | concerned [3] | 113/17 199/11 200/7 |
| citations [1] | 50/20 | concerns [8] | 148/2 150/4 150/13 151/9 |
| cite [10] | 16/25 24/22 44/14 44/23 45/14 | | 152/13 154/20 187/11 206/10 |
| | 51/17 53/17 53/20 61/4 67/20 | concert [1] | 110/12 |
| cited [11] | 17/2 17/11 28/10 48/12 50/16 | concluded [2] | 147/20 161/13 |
| | 53/15 54/9 61/12 87/24 160/15 162/25 | concludes [4] | 162/16 162/21 216/6 228/8 |
| citing [4] | 50/19 53/9 68/1 193/15 | conclusion [7] | 50/5 54/25 56/16 158/14 |
| citizenry [1] | 75/8 | | 159/17 187/18 188/11 |
| citizens [3] | 4/25 15/11 60/17 | conclusions [8] | 5/8 12/22 27/24 28/8 |
| citizenship [2] | 17/9 68/22 | | 50/3 54/24 56/13 167/17 |
| city [2] | 38/19 124/20 | concurs [1] | 164/11 |
| civil [8] | 1/4 14/25 15/11 35/22 36/1 | condition [5] | 16/24 65/10 65/17 156/21 |
| | 69/18 71/15 88/7 | | 163/14 |
| civilian [7] | 37/17 38/2 38/7 39/2 50/17 | conditions [5] | 17/7 37/10 165/21 167/6 |
| | 50/22 106/22 | | 187/8 |
| civilians [2] | 23/16 97/14 | conduct [2] | 100/10 139/25 |
| civility [1] | 196/3 | conducted [7] | 27/12 29/24 126/18 126/21 |
| claim [2] | 81/21 187/19 | | 126/24 127/1 140/16 |
| Claims [1] | 144/9 | conducts [1] | 24/17 |
| class [32] | 15/11 91/12 91/13 91/15 91/21 | Confederate [3] | 69/21 71/6 71/23 |
| | 96/15 151/5 171/13 171/17 174/15 182/16 | Confederates [2] | 70/7 71/16 |
| | 182/18 182/24 183/2 183/2 183/3 183/6 | conference [2] | 11/20 233/10 |
| | 186/10 204/20 211/23 212/7 212/8 215/11 | confidence [2] | 11/1 122/14 |

| | | |
|--|--|--|
| D | definitely [2] 116/15 226/24 | 87/21 90/16 90/21 90/23 90/24 91/6 91/7 91/8 91/10 92/12 93/16 102/18 110/5 114/10 115/13 116/13 134/5 134/8 135/7 135/9 135/13 135/16 136/6 138/25 139/8 139/9 139/15 140/24 141/6 141/18 143/7 145/2 145/7 146/5 146/6 148/20 152/3 153/22 155/20 156/1 157/1 157/1 157/7 157/10 163/5 165/20 169/18 173/10 174/11 174/14 174/16 174/24 179/16 180/10 183/4 185/13 186/6 186/8 186/9 186/11 186/18 190/22 196/9 197/22 202/1 202/3 208/6 212/23 220/3 220/7 222/5 224/1 224/15 224/16 225/14 227/13 227/14 227/16 227/19 |
| data... [2] 152/5 158/23 159/2 159/6 154/14 154/18 156/5 157/10 158/20 158/20 162/8 166/14 167/8 167/11 167/13 187/4 222/17 222/20 224/2 224/2 224/7 224/14 224/17 224/20 225/2 225/4 | definition [12] 16/1 32/10 159/24 160/7 168/10 168/11 168/12 168/13 168/14 206/21 231/14 | didn't [27] 48/9 48/12 53/17 57/13 58/6 67/12 75/13 83/18 100/9 100/11 103/18 111/19 113/21 118/3 126/6 189/13 191/12 191/25 194/19 200/25 211/19 214/11 218/14 223/13 225/6 225/9 227/24 |
| database [6] 41/17 71/13 75/23 76/6 76/19 78/2 | Definitively [1] 230/13 | died [1] 37/6 |
| dataset [33] 4/4 5/4 9/22 11/4 12/14 14/17 32/4 40/1 41/11 71/3 71/4 72/6 72/13 76/10 79/25 81/18 81/21 81/25 82/5 82/8 83/20 87/15 87/18 88/3 88/13 147/16 147/17 154/10 155/7 155/15 156/8 168/15 211/14 | degree [18] 16/3 16/9 27/18 28/3 29/1 31/5 32/8 34/15 34/16 40/5 91/25 102/9 112/25 134/8 135/5 135/6 135/14 135/14 | Diego [1] 94/16 |
| datasets [5] 11/5 11/6 11/8 13/2 32/2 | degrees [3] 31/11 92/1 135/13 | dies [1] 13/16 |
| date [1] 81/16 | Del [2] 105/11 107/3 | differ [1] 143/15 |
| Dated [1] 233/12 | delves [1] 63/17 | difference [21] 45/24 52/23 57/25 69/4 78/15 98/18 99/5 99/10 102/7 102/8 110/14 110/15 112/24 115/14 115/16 115/20 124/25 125/25 126/3 154/15 199/17 |
| David [12] 213/16 213/21 213/24 214/1 214/10 214/18 214/19 215/14 215/22 216/4 225/8 225/22 | demanding [1] 36/3 | differences [15] 56/21 56/24 57/1 77/19 98/5 98/17 99/2 99/12 99/22 126/8 126/11 161/17 164/1 188/2 226/17 |
| Davis's [1] 69/25 | demands [1] 39/11 | different [48] 10/19 19/7 19/10 23/2 27/13 30/8 33/1 33/4 64/1 69/6 74/15 80/25 81/12 81/16 86/21 95/22 98/7 98/13 99/8 101/20 101/21 101/22 101/23 101/23 101/23 110/10 110/11 111/3 112/21 118/20 118/24 120/10 125/2 125/13 126/7 138/23 140/23 153/16 157/5 180/20 184/9 187/8 197/19 198/9 216/12 216/20 218/15 219/25 |
| day [10] 1/3 41/8 72/14 72/20 72/21 104/20 232/3 232/7 232/10 233/12 | democracy [1] 20/13 | differently [2] 81/13 87/10 |
| days [1] 115/8 | democratic [1] 46/17 | difficult [7] 100/4 114/19 116/12 121/17 128/10 129/16 186/22 |
| DB5 [1] 146/24 | demographic [1] 129/20 | difficulty [1] 128/25 |
| DB5.10 [1] 153/1 | demographics [1] 68/25 | dig [1] 155/9 |
| DD5.2 [1] 147/25 | demography [1] 4/2 | diluted [1] 181/17 |
| DDFP [1] 94/20 | demonstrate [2] 36/9 37/13 | dimensions [3] 217/15 219/19 226/22 |
| DDGs [1] 53/18 | demonstrates [1] 61/20 | dire [1] 145/21 |
| deal [11] 131/2 131/17 131/17 131/19 172/10 172/25 192/11 199/20 200/12 201/7 202/14 | demonstrative [11] 5/17 5/19 15/19 17/24 18/1 36/11 146/15 160/5 176/24 181/1 188/12 | direct [17] 2/6 2/8 2/11 3/14 39/8 41/17 89/22 103/3 128/22 133/19 140/24 141/3 141/15 166/6 191/7 221/3 230/5 |
| dealing [2] 171/20 198/7 | Demonstrative 40 [1] 176/24 | direction [6] 67/5 142/5 158/7 179/18 179/21 188/8 |
| deals [2] 171/23 171/25 | demonstratives [2] 147/1 153/1 | directions [1] 80/16 |
| dealt [1] 172/4 | denied [2] 216/20 223/13 | directly [5] 40/2 140/10 153/9 193/19 194/1 |
| Dean [17] 129/18 129/19 142/1 153/14 156/17 164/22 165/18 166/12 173/6 174/4 174/14 211/9 213/8 214/18 220/25 221/19 222/5 | deny [2] 77/24 171/22 | director [2] 94/20 134/4 |
| December [3] 128/2 128/17 216/7 | departing [1] 80/21 | disadvantage [3] 163/23 164/4 164/19 |
| decide [1] 83/18 | department [20] 90/12 90/15 93/16 103/24 104/6 104/19 105/11 107/1 111/6 111/6 145/2 190/4 202/1 209/4 209/7 209/11 209/22 210/20 212/18 229/24 | disadvantaged [3] 164/11 165/15 167/12 |
| decided [3] 195/15 224/20 224/25 | department's [2] 25/7 25/13 | disagree [4] 44/1 51/4 153/15 197/14 |
| decides [2] 13/18 156/9 | departments [1] 111/5 | disagreement [4] 152/11 152/13 158/6 158/7 |
| decision [24] 37/2 135/25 136/1 138/23 141/8 141/22 143/6 149/7 153/19 156/5 169/3 170/18 170/19 170/25 173/2 178/4 178/5 178/17 184/21 215/8 216/9 216/19 216/21 216/24 | depend [1] 174/22 | disagreements [1] 10/24 |
| decision-maker [1] 184/21 | dependent [1] 173/4 | disclaimer [1] 185/14 |
| decision-makers [2] 141/8 141/22 | depending [2] 59/7 95/16 | disclose [9] 191/23 191/25 193/9 193/17 194/17 194/21 195/13 197/11 202/1 |
| decision-making [5] 37/2 136/1 138/23 143/6 153/19 | depends [10] 56/23 56/23 78/15 124/21 170/18 173/16 175/7 210/23 217/9 219/9 | disclosing [1] 194/22 |
| decisions [45] 12/7 57/9 136/23 136/24 139/1 143/17 147/14 147/22 149/3 149/20 154/19 156/18 156/23 157/11 164/20 168/20 169/5 169/22 170/1 170/3 170/5 170/11 170/21 170/24 171/2 171/4 171/7 171/9 173/9 173/13 173/17 173/19 174/18 174/22 175/4 175/8 175/13 187/5 187/19 215/8 215/24 216/12 217/10 219/9 219/25 | depict [2] 184/22 185/22 | disclosure [2] 79/22 192/17 |
| deck [1] 92/25 | depicting [1] 182/5 | discovery [1] 199/21 |
| declaration [2] 128/17 214/18 | deployed [8] 93/20 95/5 95/7 95/8 95/9 95/9 95/15 121/1 | discrete [6] 137/13 137/14 137/15 137/20 138/17 138/20 |
| decline [3] 176/18 181/13 195/13 | deployment [1] 94/7 | discriminate [1] 4/12 |
| declined [1] 172/9 | deposition [2] 189/13 205/3 | discriminated [3] 22/18 22/21 23/6 |
| decoupled [1] 108/1 | deputy [2] 94/6 94/20 | discriminating [1] 4/23 |
| decrease [1] 34/4 | derive [2] 169/2 170/8 | discrimination [33] 15/12 22/15 23/11 24/5 24/13 24/20 25/21 25/24 26/3 26/9 26/20 28/20 29/1 29/6 29/9 29/11 29/13 29/14 29/19 31/12 31/16 35/14 35/20 47/10 69/7 79/2 80/15 81/5 81/6 82/21 83/7 84/23 85/14 |
| decreased [2] 58/2 59/1 | derived [1] 142/22 | discuss [2] 36/13 88/20 |
| decreases [1] 172/8 | derives [3] 147/19 148/14 149/23 | discussed [6] 21/18 50/16 159/12 169/4 207/11 226/21 |
| dedicated [1] 157/21 | deriving [1] 155/18 | discussion [3] 36/17 48/17 55/23 |
| deep [1] 102/15 | describe [12] 5/12 27/24 63/25 66/20 113/3 140/24 150/12 156/17 174/3 177/2 179/24 212/23 | disempowered [1] 47/25 |
| deeper [2] 63/17 151/15 | described [8] 100/5 157/6 165/18 166/13 167/10 173/6 185/20 206/6 | disparities [1] 27/5 |
| defeat [1] 14/15 | describes [3] 46/10 47/7 47/9 | disparity [1] 150/21 |
| defection [4] 6/10 6/24 7/23 9/13 | describing [3] 92/19 121/16 216/5 | display [1] 25/13 |
| defend [2] 83/1 105/5 | description [3] 151/3 151/4 183/13 | disposition [1] 101/21 |
| Defendant [1] 1/17 | desert [3] 14/4 23/25 96/9 | disproportion [1] 131/16 |
| Defendant's [2] 33/5 146/4 | desertion [7] 6/8 6/23 7/23 9/12 15/3 15/8 24/1 | disproportionate [2] 129/25 130/12 |
| defendants [3] 1/7 89/8 229/1 | deserves [1] 201/10 | |
| Defendants' [8] 5/14 5/18 44/13 49/20 52/14 60/2 102/19 108/8 | designate [1] 184/20 | |
| defending [1] 77/21 | designation [1] 93/5 | |
| defense [17] 24/24 28/11 33/8 46/24 84/6 94/22 94/24 94/25 96/1 100/7 100/10 209/4 209/8 209/11 209/22 210/20 212/18 | designed [2] 4/2 187/19 | |
| Defense's [2] 94/5 97/21 | despite [1] 78/11 | |
| defenses [1] 73/9 | destroy [1] 23/9 | |
| Defensive [1] 123/17 | destroyer [8] 93/21 94/6 94/10 96/14 96/15 96/16 96/18 97/1 | |
| deferred [1] 216/8 | destroyers [3] 54/2 92/24 96/20 | |
| define [2] 6/3 187/13 | detaching [1] 113/14 | |
| defined [2] 206/24 217/10 | detachments [1] 60/19 | |
| defining [1] 173/5 | detail [3] 47/7 149/14 228/16 | |
| | detailed [1] 157/5 | |
| | details [1] 102/14 | |
| | detecting [1] 115/18 | |
| | determinant [1] 174/6 | |
| | determination [1] 118/21 | |
| | determine [1] 139/6 | |
| | devastation [1] 16/8 | |
| | develop [3] 105/23 138/24 187/3 | |
| | developed [1] 147/15 | |
| | developing [1] 138/17 | |
| | develops [1] 167/19 | |
| | did [119] 10/17 12/18 12/22 15/8 21/17 21/19 28/7 28/9 29/10 29/14 29/20 30/2 30/14 30/16 32/15 32/16 35/19 38/4 38/5 42/16 42/18 45/11 47/16 48/10 53/20 53/20 54/13 54/15 58/6 59/9 63/2 64/17 66/9 67/13 67/14 70/7 70/10 70/11 79/2 | |

| | |
|--|---|
| D | due [3] 47/3 62/13 168/18 |
| dispute [3] 195/24 204/17 280/5 | Duke [1] 205/21 |
| disputes [1] 140/17 | during [3] 91/7 106/24/7 144/22 216/17 220/23 |
| disrespect [1] 199/20 | duties [1] 90/10 |
| dissatisfaction [1] 85/22 | duty [12] 24/18 25/5 25/5 25/19 25/25 26/5 28/6 28/12 91/15 92/7 95/13 101/2 |
| dissatisfied [1] 29/9 | DX [1] 146/4 |
| dissertation [4] 138/19 139/8 206/14 206/19 | DX195 [2] 9/2 79/18 |
| distinction [4] 150/6 150/20 176/3 177/15 | DX200 [1] 146/7 |
| distinguishing [1] 218/6 | DX66 [1] 102/17 |
| district [10] 1/1 1/1 144/7 144/7 175/7 203/9 203/10 219/9 233/5 233/6 | DX67 [1] 105/7 |
| districts [1] 175/6 | dynamic [2] 100/12 131/2 |
| dive [1] 151/15 | dynamics [1] 38/24 |
| diverse [38] 16/24 18/7 18/7 18/17 37/18 40/9 60/15 60/22 104/2 104/21 105/24 106/20 107/5 107/8 108/12 108/13 108/15 109/9 109/13 110/2 111/24 112/1 112/7 115/11 115/17 115/23 115/25 116/3 116/18 118/15 119/24 120/5 120/16 217/15 217/23 218/22 219/4 219/18 | E |
| diversity [94] 15/21 16/12 16/14 16/19 16/22 17/16 17/19 17/25 18/4 18/24 19/3 19/5 19/6 19/24 20/3 20/7 20/13 20/19 20/20 21/1 21/3 21/4 21/20 27/13 36/9 36/24 37/11 37/14 37/16 38/20 40/8 44/15 44/17 44/21 44/24 45/23 50/9 50/17 57/7 60/22 60/24 60/25 61/2 67/24 68/3 68/9 68/13 68/19 70/1 106/14 107/1 107/12 107/20 107/21 107/23 107/24 107/25 108/2 108/19 108/21 108/22 108/25 112/2 112/18 113/10 114/11 114/14 114/14 114/24 115/1 116/5 116/22 116/24 116/24 118/9 119/4 120/19 122/5 122/7 128/11 128/25 130/18 131/19 173/14 173/15 173/16 173/18 173/20 173/25 174/1 174/4 217/9 219/13 220/1 | E5 [1] 56/3 |
| diverted [1] 41/6 | E6 [1] 56/3 |
| divided [4] 7/18 11/12 30/14 41/15 | E7 [1] 56/4 |
| dividends [1] 16/20 | E9 [1] 56/4 |
| division [3] 1/2 93/13 144/8 | each [24] 3/24 19/11 19/11 19/12 31/6 32/8 36/14 70/19 71/5 99/7 99/10 100/18 110/18 110/25 116/11 124/6 124/10 151/15 170/6 171/24 172/1 184/21 194/22 219/18 |
| divisions [2] 111/3 111/4 | Eagle [1] 231/9 |
| do [217] 3/7 5/3 9/5 10/9 10/17 12/25 14/7 19/16 20/14 20/20 20/22 21/21 21/23 22/25 23/24 24/6 24/8 24/16 24/23 26/18 27/1 27/12 29/23 29/24 30/20 31/9 31/14 34/5 35/19 39/6 39/14 39/20 39/22 41/24 44/1 44/16 44/25 47/15 47/18 48/3 48/7 48/17 50/7 52/12 52/18 53/6 56/1 59/20 61/3 61/8 61/15 63/15 64/20 64/21 65/7 67/23 70/3 73/5 73/17 73/20 78/25 79/20 80/5 81/25 81/25 82/3 82/4 82/9 83/24 84/2 84/11 84/13 84/16 85/1 86/14 91/12 91/25 92/23 93/23 93/23 95/19 99/18 99/22 100/15 100/16 100/23 101/3 101/16 101/24 103/2 103/5 103/13 103/14 103/17 104/23 104/24 105/16 106/4 106/5 106/10 107/18 107/19 108/1 109/7 112/10 112/18 113/10 116/21 117/2 117/7 118/7 118/25 120/1 120/23 121/13 122/1 122/2 124/22 125/22 126/6 127/6 133/24 135/7 139/15 139/25 141/10 141/13 143/14 146/7 146/9 146/15 146/17 148/9 148/17 149/1 149/6 151/15 152/3 153/11 153/15 155/12 157/18 159/9 160/24 161/15 161/21 162/23 168/14 168/14 169/17 170/2 171/2 178/14 180/8 180/18 183/19 185/1 185/17 188/11 189/17 189/24 191/14 191/19 192/2 192/18 194/5 196/14 197/11 197/18 198/3 198/6 200/9 200/23 203/4 203/13 205/3 205/12 205/19 206/3 206/25 207/13 208/24 209/8 209/13 209/16 210/2 210/6 210/6 210/11 210/18 210/24 210/24 211/10 212/1 215/9 215/12 216/10 216/24 216/25 217/12 217/25 218/9 219/2 219/10 219/21 219/24 220/6 220/18 221/11 223/15 223/15 226/19 227/11 230/19 231/7 231/15 233/6 | earlier [8] 19/25 21/18 50/15 59/4 85/3 118/14 119/3 180/6 |
| docket [6] 196/23 196/25 197/2 197/4 203/14 215/1 | early [5] 114/5 216/6 216/19 216/20 216/23 |
| Doctor [2] 135/3 145/25 | easier [2] 103/20 147/5 |
| doctoral [4] 135/14 135/16 136/9 138/19 | easiest [1] 137/20 |
| doctors [1] 128/22 | easily [1] 138/4 |
| document [13] 47/22 49/22 59/25 60/3 60/7 62/18 80/8 102/22 102/24 103/4 105/8 105/10 214/19 | eastern [2] 73/11 203/10 |
| documentary [1] 217/5 | ECF [1] 52/14 |
| documentation [1] 22/20 | echo [1] 134/23 |
| documents [4] 141/9 142/7 142/7 176/22 | econometric [11] 136/15 136/22 138/11 139/25 142/13 142/19 142/20 142/22 145/19 147/15 205/9 |
| does [79] 17/18 25/13 25/15 26/8 26/10 | econometrics [15] 135/19 135/20 135/21 136/2 136/3 136/7 136/11 136/12 136/13 137/8 138/8 138/10 138/15 140/4 143/3 |
| | economic [19] 4/11 43/14 81/6 135/22 138/24 139/1 140/6 140/7 140/8 141/2 143/5 144/11 144/11 144/25 152/20 164/4 164/7 204/13 211/10 |
| | economics [13] 133/25 135/6 135/14 135/15 135/18 137/6 137/11 139/11 142/8 144/11 145/12 145/18 155/22 |
| | economist [7] 140/2 140/13 141/21 142/10 163/6 213/18 213/24 |
| | economists [6] 19/8 137/24 139/17 140/5 143/4 145/14 |
| | Economy [2] 160/16 185/13 |
| | Ed [2] 228/22 228/24 |
| | edge [1] 139/12 |
| | editor [3] 206/7 206/16 206/22 |
| | editors [1] 12/16 |
| | education [4] 91/3 98/1 98/2 140/22 |
| | EDWARD [2] 1/21 198/21 |
| | effect [43] 19/19 19/20 19/21 29/5 33/25 44/4 50/9 57/9 57/18 63/18 66/11 67/9 77/6 85/12 134/12 134/17 148/11 149/12 152/18 153/14 155/8 158/8 158/15 164/23 169/6 172/1 178/3 178/8 178/15 178/20 179/2 179/3 179/18 182/23 183/5 209/23 209/24 210/3 210/7 210/7 212/6 218/23 223/6 |
| | effective [3] 62/3 67/17 115/24 |
| | effectiveness [5] 51/9 51/13 62/8 62/12 62/24 |
| | effects [10] 33/22 33/23 34/10 35/10 37/16 43/20 44/8 48/13 69/2 167/19 |
| | effort [4] 90/13 227/7 227/11 227/23 |
| | efforts [2] 110/16 209/14 |
| | eight [3] 72/24 72/25 73/5 |
| | eighth [3] 110/12 110/18 110/21 |
| | either [9] 26/24 85/24 87/2 98/13 131/7 147/4 174/9 195/20 202/7 |
| | Elder [1] 160/17 |
| | elect [1] 84/8 |
| | elections [1] 46/17 |
| | element [1] 125/17 |
| | elementary [1] 225/11 |
| | elements [4] 45/8 108/24 125/1 227/12 |
| | eligible [1] 181/9 |
| | eliminated [1] 150/6 |
| | elimination [1] 176/2 |
| | elite [1] 119/23 |
| | eloquently [1] 114/19 |
| | else [9] 121/7 124/23 125/23 152/18 |

| | | |
|---|---|---|
| E | era [2] 43/1 43/5 | 86/20 89/22 122/22 123/6 133/19 189/9 |
| else... [5] 155/6 155/20 181/22 201/18 | error [1] 166/19 | 221/3 226/11 229/6 230/3 |
| 232/1 | escape [2] 133/243 | examined [2] 229/15 229/16 |
| elsewhere [1] 27/5 | especially [3] 47/12 62/3 74/10 | examined [1] 214/7 |
| email [1] 221/7 | ESQUIRE [14] 1/12 1/13 1/13 1/14 1/14 | examining [2] 93/17 100/23 |
| embarked [1] 101/10 | 1/15 1/15 1/16 1/17 1/18 1/18 1/19 1/19 | example [81] 4/22 7/2 7/3 13/5 13/8 |
| embedded [2] 139/6 184/1 | 1/20 | 14/23 14/25 15/7 16/17 16/19 17/2 17/10 |
| embodies [1] 47/9 | essential [1] 23/8 | 17/10 17/11 17/23 20/2 27/11 27/16 28/19 |
| emerging [3] 8/8 35/13 37/18 | essentially [14] 4/4 21/4 30/22 34/25 | 31/5 31/8 31/10 31/20 34/14 35/11 36/2 |
| Emily [1] 163/16 | 46/11 166/23 167/18 169/23 172/2 172/9 | 37/4 37/12 37/13 37/22 38/8 38/19 39/9 |
| empire [2] 17/1 17/2 | 178/3 196/9 229/11 229/12 | 43/22 49/13 50/23 50/24 51/7 60/14 60/14 |
| empirical [10] 49/25 51/2 51/4 51/7 | establish [1] 210/19 | 69/17 70/18 70/18 73/24 73/25 77/4 77/19 |
| 151/3 151/12 162/10 210/12 210/23 212/24 | established [1] 56/11 | 79/13 84/3 86/22 86/23 100/5 109/2 110/6 |
| empirically [1] 159/22 | establishing [1] 50/5 | 111/5 112/20 113/7 116/14 117/25 119/8 |
| employ [4] 100/20 140/5 143/4 145/7 | esteem [1] 62/5 | 120/9 120/16 122/5 122/7 124/17 125/3 |
| employed [7] 89/25 90/1 136/4 136/14 | estimate [26] 67/8 71/8 148/25 149/4 | 126/4 137/4 137/17 138/16 138/19 156/17 |
| 139/20 145/13 178/2 | 149/6 152/3 152/22 153/17 155/12 155/18 | 161/7 161/20 163/20 163/23 174/5 177/13 |
| employer [1] 164/6 | 158/4 158/22 158/24 159/2 159/4 159/6 | 180/23 187/7 210/14 |
| employment [1] 43/12 | 159/15 165/16 167/19 168/18 179/1 179/9 | examples [10] 14/20 16/25 35/2 39/5 |
| empowering [6] 103/13 103/22 105/15 | 179/12 183/6 185/15 230/1 | 88/13 112/18 113/10 117/14 120/23 177/2 |
| 105/16 106/13 118/8 | estimated [2] 204/25 211/6 | excellence [1] 217/22 |
| encompasses [2] 72/14 166/5 | estimates [22] 147/19 148/2 148/18 | excellences [1] 218/7 |
| encountered [1] 60/18 | 157/12 157/16 157/18 157/22 157/24 | excellent [1] 17/2 |
| end [10] 33/13 56/1 123/17 128/25 129/1 | 158/17 159/20 160/11 163/21 168/22 169/7 | except [1] 92/20 |
| 147/14 159/2 159/17 161/3 228/18 | 170/7 178/7 178/8 180/3 183/23 187/3 | excerpt [3] 156/19 157/20 165/2 |
| ended [1] 91/12 | 207/8 207/8 | exchange [13] 6/5 7/2 7/3 7/7 7/9 7/23 |
| ending [3] 85/7 85/13 179/20 | estimating [2] 148/10 158/11 | 9/9 9/24 10/2 12/19 13/6 14/20 16/18 |
| enduring [3] 103/6 103/8 104/9 | estimation [5] 142/21 143/13 145/10 | exchanges [1] 204/14 |
| enemy [1] 115/18 | 151/19 152/7 | excluded [1] 69/15 |
| energizing [1] 118/8 | ET [1] 1/6 | excludes [1] 69/12 |
| energy [2] 118/2 140/21 | ethical [1] 50/7 | exclusion [2] 45/23 70/5 |
| enforcement [2] 63/10 67/9 | ethnic [83] 4/6 4/7 4/10 4/14 4/18 4/19 | exclusive [1] 14/22 |
| enforcers [1] 62/1 | 4/19 4/20 4/21 4/23 4/25 15/21 16/14 | excuse [2] 135/25 216/2 |
| enforcing [1] 65/19 | 17/16 17/19 19/18 23/1 23/3 24/3 24/12 | excused [1] 228/10 |
| engage [1] 34/25 | 25/20 25/24 26/3 28/25 29/8 29/11 29/19 | execution [1] 112/11 |
| engaged [7] 10/14 38/3 39/13 39/25 75/10 | 31/2 31/6 32/3 32/5 32/8 32/16 34/13 | executive [4] 32/5 32/9 82/18 84/1 |
| 222/14 223/9 | 34/17 35/17 46/13 60/17 60/23 60/25 61/2 | exemplars [1] 17/1 |
| engagement [1] 61/22 | 62/11 62/13 63/20 64/13 65/21 67/24 68/9 | exercise [7] 16/3 32/17 74/25 183/25 |
| engaging [2] 16/1 40/4 | 68/13 68/19 69/11 73/15 73/17 74/11 | 185/14 185/19 216/18 |
| engineer [2] 93/15 119/12 | 79/25 80/6 80/15 81/17 81/22 82/5 82/7 | exhibit [25] 5/14 5/19 24/24 28/11 33/6 |
| engineering [1] 111/5 | 87/13 87/18 87/19 87/22 87/23 107/20 | 33/8 44/13 46/4 48/20 49/20 52/14 54/18 |
| engineers [1] 114/15 | 107/23 108/19 108/22 108/25 114/14 | 54/19 60/2 61/11 63/6 102/19 108/8 146/4 |
| enhance [5] 18/18 103/10 104/6 106/2 | 116/24 129/22 129/25 130/7 130/12 130/20 | 214/13 216/4 221/7 225/7 225/9 231/12 |
| 107/13 | 161/12 161/13 161/25 174/1 219/20 | Exhibit 195 [5] 5/14 33/6 44/13 49/20 |
| enhances [1] 118/15 | Ethnic Group A [3] 4/19 4/20 4/23 | 60/2 |
| enjoined [2] 208/20 209/23 | Ethnic Group B [2] 4/21 4/25 | Exhibit 195-026 [1] 52/14 |
| enjoy [1] 4/11 | ethnically [1] 35/1 | Exhibit 207 [1] 221/7 |
| enjoyed [2] 81/22 222/10 | ethnicities [2] 69/6 86/21 | Exhibit 243 [1] 214/13 |
| enlightened [1] 69/25 | ethnicity [16] 108/1 116/19 150/5 150/7 | Exhibit 33 [1] 225/9 |
| enlisted [22] 21/6 21/9 21/10 23/5 54/11 | 150/10 151/20 175/23 176/1 176/3 178/3 | Exhibit 66 [2] 102/19 108/8 |
| 54/25 55/5 55/6 55/14 55/18 55/23 56/3 | 178/12 178/25 179/3 179/10 180/4 220/14 | Exhibit 867 [1] 63/6 |
| 56/6 56/9 56/18 57/10 57/16 57/19 78/24 | ethnocracy [1] 13/19 | Exhibit 872 [2] 54/18 54/19 |
| 130/1 130/13 130/19 | Europe [5] 32/4 64/20 73/8 73/11 95/11 | Exhibit 873 [1] 46/4 |
| enough [6] 37/23 66/4 66/6 202/12 208/8 | European [1] 72/9 | Exhibit 878 [2] 216/4 225/7 |
| 208/17 | evaluate [1] 105/22 | Exhibit 895 [1] 5/19 |
| enroll [1] 217/14 | evaluating [1] 163/2 | exhibits [5] 146/15 217/22 230/24 231/5 |
| enrollment [6] 151/14 187/16 187/22 | evaluation [1] 144/12 | 231/14 |
| 188/6 188/14 224/17 | eve [6] 4/3 13/15 30/23 70/17 70/21 | exist [1] 67/3 |
| ensure [3] 10/17 111/24 174/14 | 70/25 | existed [1] 210/22 |
| enter [1] 170/25 | even [12] 13/22 57/25 66/8 79/5 84/21 | existing [2] 22/17 22/23 |
| entered [1] 11/22 | 99/14 99/24 101/20 114/19 128/22 192/16 | exit [1] 113/14 |
| entering [3] 11/2 138/21 138/21 | 208/12 | exited [1] 192/13 |
| entire [7] 78/23 106/2 159/19 183/6 | evening [1] 231/22 | Expand [1] 103/10 |
| 208/4 208/10 212/9 | event [4] 9/20 77/9 88/20 228/7 | expect [3] 66/11 114/4 169/2 |
| entirely [4] 155/4 156/6 167/21 168/8 | events [2] 8/10 85/10 | expectations [1] 113/24 |
| entirety [1] 192/7 | eventual [1] 206/22 | expected [3] 201/23 228/25 229/1 |
| entitled [2] 1/9 233/9 | eventually [2] 6/18 13/24 | expeditionaries [1] 98/13 |
| entry [1] 215/1 | ever [5] 75/11 99/15 142/23 143/21 | expeditionary [1] 98/9 |
| environment [18] 19/8 19/14 19/23 39/17 | 225/13 | expended [2] 195/18 196/14 |
| 110/22 110/23 110/24 110/24 111/13 | every [21] 4/3 5/4 8/11 8/12 9/21 14/17 | expense [2] 180/12 180/15 |
| 111/17 111/25 112/2 112/3 112/4 112/19 | 32/5 32/6 32/16 78/4 83/5 83/12 92/19 | expenses [1] 195/21 |
| 112/25 113/4 113/11 | 95/15 100/22 104/3 104/20 106/20 106/22 | expensive [1] 111/20 |
| environments [6] 29/25 39/12 39/17 40/11 | 124/25 184/17 | experience [27] 10/5 29/10 29/14 48/21 |
| 98/19 112/9 | everyone [7] 3/2 120/5 120/12 120/13 | 98/2 99/18 99/19 100/12 101/12 102/10 |
| envision [1] 117/9 | 120/18 123/19 132/19 | 102/13 102/14 113/22 114/9 126/4 126/9 |
| epic [1] 35/18 | everything [7] 93/23 93/24 106/10 121/7 | 126/12 126/19 139/14 140/25 141/3 141/10 |
| EPR [7] 32/4 32/15 33/1 83/12 83/20 | 134/13 152/15 184/24 | 141/13 141/15 142/19 143/7 143/9 |
| 83/20 85/1 | evidence [22] 14/24 18/13 24/25 28/11 | experienced [9] 28/23 28/25 29/8 29/13 |
| EPR's [1] 82/19 | 51/25 53/6 54/20 62/21 62/22 62/25 63/11 | 29/19 30/1 35/14 38/17 47/23 |
| equal [2] 25/4 46/22 | 66/14 66/23 108/7 108/9 147/2 151/12 | experiences [9] 24/4 114/17 114/18 115/2 |
| equality [2] 3/21 41/12 | 176/22 187/11 188/13 217/5 231/14 | 126/7 126/11 174/6 217/23 218/8 |
| equally [1] 21/10 | evident [1] 109/2 | experiencing [5] 25/20 25/24 26/2 28/20 |
| equation [2] 68/6 69/8 | evolved [1] 36/19 | 29/5 |
| equip [2] 98/20 107/7 | evolves [1] 188/8 | experiment [5] 50/1 65/9 65/10 66/9 |
| equipment [2] 107/9 111/20 | evolving [1] 106/1 | 67/14 |
| equipped [1] 99/9 | exacerbating [1] 35/9 | expert [36] 5/11 21/20 48/10 56/11 |
| equity [5] 106/14 107/1 107/12 193/21 | exact [2] 42/3 71/8 | 141/16 142/12 142/15 143/1 143/2 144/1 |
| 194/2 | exactly [7] 39/8 138/7 139/4 144/5 169/9 | 144/10 144/13 145/18 145/23 146/5 146/8 |
| equivalent [6] 39/9 82/20 83/7 84/23 | 174/3 214/25 | 167/7 191/24 192/23 194/15 194/18 195/4 |
| 134/9 135/6 | examination [14] 3/14 40/15 40/19 86/16 | 195/10 195/13 195/17 196/14 199/2 199/3 |

| | | |
|--|--|--|
| <div><div><div>E</div><div>expert... [3] 199/4 199/8 199/5 199/9 199/13 214/1 217/3 222/20</div><div>experts [7] 82/9 100/18 193/16 194/17 194/22 195/5 196/12</div><div>explain [11] 3/23 19/1 67/12 86/25 100/4 152/23 177/25 204/5 211/9 226/19 228/12</div><div>explained [6] 9/8 136/24 154/8 154/13 170/24 181/21</div><div>explaining [4] 139/12 154/19 206/1 211/12</div><div>explains [2] 154/17 155/3</div><div>explanation [3] 63/18 63/21 176/20</div><div>explanations [3] 10/12 10/16 20/12</div><div>explicit [4] 62/16 82/21 83/7 167/8</div><div>explicitly [5] 152/16 160/19 161/2 172/1 227/6</div><div>exploitation [1] 66/21</div><div>explosive [1] 119/13</div><div>exposed [2] 23/13 35/20</div><div>exposure [5] 23/18 24/20 31/16 38/11 56/2</div><div>expressed [2] 55/24 152/25</div><div>extension [1] 34/6</div><div>extensions [1] 216/18</div><div>extensively [1] 211/9</div><div>extent [7] 132/25 153/18 182/16 195/16 198/8 210/22 227/9</div><div>extra [2] 123/20 123/21</div><div>extract [1] 37/20</div><div>extracurricular [1] 219/19</div><div>extraordinarily [1] 140/20</div><div>extreme [6] 5/25 6/18 7/17 8/7 8/17 8/22</div></div><div><div>F</div><div>F-U-L-L-E-R [1] 89/19</div><div>face [5] 22/10 104/20 105/24 165/7 165/10</div><div>faced [2] 13/25 39/16</div><div>fact [17] 30/9 30/25 46/20 63/25 83/24 85/3 103/24 119/10 119/11 121/22 126/19 126/25 151/12 179/8 186/25 211/9 217/14</div><div>fact-based [2] 126/19 126/25</div><div>factor [5] 20/15 42/22 165/4 184/7 184/23</div><div>factors [16] 18/3 19/25 20/4 154/2 156/1 156/4 161/6 168/7 168/19 175/17 211/1 211/7 211/15 212/16 213/6 213/10</div><div>facts [1] 139/5</div><div>fail [3] 27/3 165/20 210/10</div><div>failed [2] 149/10 167/5</div><div>failing [1] 66/18</div><div>fails [2] 154/2 169/2</div><div>failure [7] 167/13 167/16 168/10 169/10 175/16 180/4 185/5</div><div>fair [14] 1/3 1/21 59/8 66/4 66/6 123/10 130/22 130/23 131/20 204/25 214/1 214/19 222/24 223/24</div><div>fairest [1] 200/23</div><div>fairly [3] 57/3 74/11 154/19</div><div>fairness [1] 202/6</div><div>fall [2] 84/25 85/2</div><div>fallen [1] 176/15</div><div>falls [2] 176/13 178/13</div><div>Fallujah [1] 38/18</div><div>familiar [3] 73/13 138/22 217/1</div><div>familiarity [1] 143/9</div><div>familiarizing [1] 141/5</div><div>families [1] 104/8</div><div>family [2] 118/6 165/3</div><div>famine [1] 13/24</div><div>famous [1] 213/24</div><div>fans [1] 124/22</div><div>far [8] 29/9 73/11 113/8 120/16 159/2 191/15 199/11 200/7</div><div>fared [1] 78/11</div><div>fashion [1] 13/18</div><div>Faso [3] 64/7 64/23 65/2</div><div>fast [1] 192/15</div><div>fate [2] 22/9 85/18</div><div>father [2] 91/1 91/9</div><div>favor [4] 62/25 63/20 64/12 65/18</div><div>favorability [1] 27/18</div><div>favorable [2] 12/2 66/12</div><div>favoried [1] 12/14</div><div>fear [1] 26/25</div><div>feasible [1] 50/7</div><div>feature [1] 173/7</div><div>features [1] 226/24</div><div>February [1] 202/24</div></div></div> | <div><div><div>Federal</div><div>[10] 82/21 82/23 83/7 144/1 144/7 144/7 144/9 144/16 164/3 233/16 233/16</div><div>feel [3] 26/24 47/25 48/2</div><div>fees [1] 204/21</div><div>female [5] 118/1 121/19 121/23 122/10 122/13</div><div>Fennell [1] 50/23</div><div>fertilize [1] 128/17</div><div>few [8] 28/16 32/11 40/17 86/19 95/24 127/8 127/12 150/25</div><div>fewer [1] 37/19</div><div>field [6] 13/25 67/14 136/4 136/13 145/14 218/24</div><div>fielded [2] 4/20 87/16</div><div>fields [3] 135/17 135/18 145/24</div><div>fifth [4] 151/1 151/2 175/3 182/3</div><div>fight [8] 6/15 14/6 14/10 15/14 22/23 23/21 70/3 105/21</div><div>fighting [2] 6/11 132/25</div><div>figure [2] 9/2 115/10</div><div>Figure 1 [1] 9/2</div><div>filed [11] 48/10 162/17 190/11 196/23 196/25 197/2 197/4 202/19 202/20 202/22 203/5</div><div>files [1] 221/18</div><div>filing [1] 42/17</div><div>fill [1] 183/2</div><div>final [5] 23/11 36/6 36/8 151/8 151/9</div><div>finally [1] 232/4</div><div>Finance [1] 145/1</div><div>financial [2] 135/18 200/1</div><div>find [22] 29/23 38/5 62/3 62/20 62/22 80/6 116/4 150/9 151/4 151/11 151/22 162/23 164/3 180/18 183/13 183/19 188/9 197/23 197/24 200/19 201/6 205/17</div><div>finding [4] 31/25 37/18 61/2 68/9</div><div>findings [6] 25/13 29/23 65/5 67/9 88/14 179/17</div><div>finds [1] 162/14</div><div>fine [17] 52/8 52/8 52/16 123/2 123/5 135/2 196/24 198/17 201/4 202/5 202/11 202/11 203/16 203/19 203/22 215/4 224/8</div><div>finish [3] 230/19 230/22 230/22</div><div>finished [3] 132/9 232/3 232/4</div><div>first [60] 3/8 3/22 7/8 15/20 15/21 15/23 17/14 18/6 22/7 22/16 26/23 28/18 36/16 46/10 46/17 54/3 54/3 54/5 54/25 58/12 79/3 79/5 80/3 83/12 89/16 93/7 93/12 104/14 112/21 113/12 123/12 123/13 126/3 127/14 133/12 133/14 136/9 139/3 141/22 148/1 148/2 148/6 151/1 151/16 151/17 151/19 163/25 167/14 168/23 182/9 182/13 188/5 189/21 190/7 190/11 192/14 192/18 196/21 207/23 211/24</div><div>first-term [1] 54/5</div><div>first-time [3] 54/3 54/3 58/12</div><div>fit [4] 153/24 154/16 154/17 206/18</div><div>fits [2] 153/22 154/3</div><div>five [10] 25/12 25/19 73/10 97/7 144/4 180/21 189/22 190/1 190/5 190/7</div><div>fixed [7] 171/13 171/16 172/1 172/2 182/18 211/23 215/20</div><div>flag [11] 93/17 94/13 99/17 101/5 126/14 127/15 127/15 127/19 128/2 128/11 132/12</div><div>flagged [1] 176/19</div><div>flee [4] 14/3 14/9 15/14 24/5</div><div>fleet [6] 93/18 95/10 100/24 105/21 129/21 129/22</div><div>flexible [1] 18/10</div><div>Flight [1] 96/15</div><div>flip [1] 103/12</div><div>fluctuation [1] 188/8</div><div>fluctuations [1] 188/9</div><div>focus [7] 47/12 67/23 138/24 140/3 144/21 183/9 211/13</div><div>focused [2] 98/12 104/3</div><div>focusing [1] 140/9</div><div>follow [6] 62/6 64/17 121/24 122/12 127/13 209/21</div><div>follow-up [3] 62/6 64/17 127/13</div><div>followed [3] 141/20 141/20 176/21</div><div>following [11] 46/17 76/5 76/7 93/19 94/12 94/13 94/15 94/17 94/19 145/11 178/21</div><div>follows [1] 176/23</div><div>foot [1] 35/21</div><div>footage [1] 97/16</div><div>football [6] 91/3 91/6 113/18 113/19 114/8 123/14</div></div><div><div>Footnote</div><div>[3] 53/10 82/13 216/5</div><div>Footnote 22 [1] 216/5</div><div>Footnote 23 [1] 216/5</div><div>force [32] 6/14 14/5 37/18 46/12 46/24 63/13 63/21 94/8 94/20 98/5 98/12 99/6 99/24 100/7 100/19 100/24 102/11 104/2 104/17 105/19 106/7 106/9 106/10 106/20 107/5 107/8 107/15 117/13 131/3 131/10 131/11 209/9</div><div>forced [1] 14/2</div><div>forces [17] 17/7 46/21 62/15 62/16 70/18 71/9 72/8 73/24 76/20 76/22 78/10 87/16 93/18 98/15 98/21 103/25 109/16</div><div>foregoing [1] 233/7</div><div>foreign [2] 17/5 48/16</div><div>forgive [1] 116/2</div><div>forgot [1] 190/7</div><div>form [9] 38/11 47/9 117/15 120/24 138/9 138/13 172/18 173/12 175/3</div><div>formal [1] 80/16</div><div>format [1] 233/9</div><div>forming [2] 45/19 142/16</div><div>forms [3] 41/11 217/22 227/19</div><div>forth [1] 196/6</div><div>forward [4] 89/10 103/10 143/16 184/18</div><div>fought [2] 36/3 36/4</div><div>found [8] 5/9 5/12 27/25 28/1 62/10 164/5 187/22 227/11</div><div>foundational [1] 103/23</div><div>four [23] 6/4 7/22 8/10 9/7 10/3 10/11 11/3 18/3 22/6 71/7 73/15 73/17 82/10 83/11 91/6 93/20 123/14 137/18 189/22 190/1 190/7 211/24 230/12</div><div>four-point [1] 11/3</div><div>four-year [2] 82/10 83/11</div><div>fourth [10] 18/17 36/6 73/19 150/11 150/12 179/23 179/24 179/25 182/20 214/17</div><div>fraction [1] 180/24</div><div>frame [1] 202/16</div><div>framework [4] 138/22 143/12 147/23 159/1</div><div>France [1] 62/23</div><div>Franchetti [1] 118/1</div><div>free [1] 200/14</div><div>freedoms [1] 4/11</div><div>French [5] 60/18 62/1 62/14 62/17 73/10</div><div>frequency [1] 136/24</div><div>frequent [1] 62/5</div><div>frequently [2] 220/25 221/20</div><div>freshmen [2] 215/16 215/19</div><div>friction [3] 19/14 21/7 43/24</div><div>friend [3] 220/20 221/4 223/10</div><div>friend's [1] 202/3</div><div>friends [1] 51/16</div><div>frigate [2] 93/12 93/14</div><div>frigates [1] 96/19</div><div>front [3] 16/3 79/20 79/24</div><div>fuel [1] 204/14</div><div>full [8] 4/10 4/25 70/13 122/14 136/10 139/20 157/21 161/6</div><div>fuller [17] 2/7 88/24 89/9 89/18 89/24 102/22 104/23 105/8 108/11 116/17 118/14 118/25 119/3 123/8 124/5 127/4 132/6</div><div>fully [2] 167/24 172/12</div><div>function [1] 171/13</div><div>functional [1] 138/13</div><div>functionally [1] 82/20</div><div>fundamental [2] 126/8 140/2</div><div>further [15] 40/13 57/6 86/5 86/7 88/15 104/5 109/12 122/20 127/7 131/22 131/23 131/25 132/3 142/5 228/1</div><div>furthering [1] 112/18</div><div>future [6] 91/5 100/20 105/19 109/17 116/4 201/2</div></div></div> | |
| | | <div><div>G</div><div>G-U-R-R-E-A [1] 133/15</div><div>GABRIEL [1] 1/15</div><div>game [4] 123/24 124/1 124/1 150/19</div><div>GARDNER [21] 1/17 2/11 2/12 133/17 134/22 188/19 194/8 195/3 197/1 199/5 203/2 207/12 220/20 223/10 226/10 226/13 228/2 229/3 230/25 231/20 232/1</div><div>Gardner's [1] 203/3</div><div>GARGEYA [2] 1/19 231/2</div><div>garrison [1] 98/11</div><div>garrison-based [1] 98/11</div><div>gather [4] 128/10 142/5 195/6 195/7</div><div>gathering [1] 141/8</div><div>gave [7] 16/17 113/15 142/19 143/9</div></div> |

| | | |
|---|---|--|
| <p>G</p> <p>gave... [3] 207/15 207/17 222/20</p> <p>Gen [1] 45/10</p> <p>gender [8] 46/23 112/22 112/22 112/24 113/2 113/5 113/8 121/18</p> <p>general [21] 51/21 51/22 90/1 90/10 90/11 91/17 91/23 95/3 98/6 99/14 99/17 100/2 128/18 129/9 130/16 138/12 138/15 143/3 169/1 173/14 206/5</p> <p>generalities [1] 102/12</p> <p>generally [8] 20/20 40/3 100/15 127/25 138/10 145/11 152/11 159/12</p> <p>generate [4] 19/14 31/18 32/14 32/21</p> <p>generated [2] 9/18 19/5</p> <p>generates [4] 5/2 5/4 118/2 159/16</p> <p>generating [1] 105/3</p> <p>generous [1] 65/4</p> <p>genocidal [1] 13/22</p> <p>genocides [1] 75/10</p> <p>geographic [2] 219/13 219/19</p> <p>geographical [1] 68/4</p> <p>geography [1] 166/1</p> <p>George [1] 94/7</p> <p>German [3] 72/25 75/1 75/2</p> <p>Germans [2] 73/7 73/10</p> <p>Germany [5] 72/8 72/22 73/4 75/7 75/18</p> <p>get [41] 8/6 10/6 15/13 16/16 23/20 24/1 30/22 38/4 40/17 81/6 109/22 109/23 111/8 115/9 117/8 117/12 118/23 126/3 126/9 128/18 128/22 130/17 147/9 151/23 156/13 159/2 161/24 176/16 191/19 191/25 192/16 197/8 198/10 203/14 205/12 206/8 216/2 216/24 224/1 225/6 225/10</p> <p>gets [7] 7/4 13/16 38/13 81/9 193/23 193/25 194/2</p> <p>getting [5] 38/21 47/12 118/17 198/13 231/5</p> <p>Ghana [1] 64/7</p> <p>give [15] 16/18 26/24 60/14 102/14 108/14 110/6 112/20 121/15 123/24 124/17 138/16 140/11 184/9 198/18 201/9</p> <p>given [8] 56/2 88/8 99/22 101/24 154/1 171/3 180/14 218/24</p> <p>gives [6] 82/8 109/9 147/20 158/24 174/20 175/5</p> <p>giving [3] 59/20 121/16 184/21</p> <p>glad [2] 132/9 189/4</p> <p>glasses [1] 109/3</p> <p>glibness [1] 116/2</p> <p>glue [1] 111/21</p> <p>go [95] 7/15 7/17 8/6 9/1 15/18 27/23 31/14 33/18 36/6 36/14 46/8 54/24 55/21 55/22 56/13 58/10 59/8 59/24 60/3 62/18 63/5 63/13 64/16 66/6 67/2 67/19 71/15 72/24 80/4 86/15 90/25 92/6 95/23 99/18 101/3 101/4 101/6 102/4 103/9 104/9 104/11 104/11 105/14 106/12 112/15 119/8 120/3 120/4 120/7 121/5 121/6 121/9 121/14 123/4 130/10 132/21 133/3 155/11 159/11 159/20 162/6 164/17 164/25 165/13 166/9 167/14 175/2 175/24 177/1 180/17 181/8 183/19 184/13 188/25 189/8 197/6 198/10 198/24 198/24 204/6 208/4 208/10 212/9 216/23 216/24 218/16 220/13 222/9 228/11 228/16 230/17 230/17 230/18 230/20 230/23</p> <p>goal [2] 173/18 217/21</p> <p>goals [1] 217/10</p> <p>goes [13] 5/25 8/14 63/25 65/4 66/20 98/2 98/19 150/10 179/19 179/20 200/7 200/21 212/13</p> <p>going [81] 4/21 6/19 6/23 6/25 8/7 8/10 8/18 8/23 9/9 9/20 10/5 13/18 13/19 14/3 14/4 14/21 20/10 22/10 22/13 27/20 28/16 31/1 34/3 34/18 35/4 40/3 40/4 44/11 49/15 51/15 52/6 54/18 70/20 82/4 86/9 86/13 86/13 93/25 99/20 100/22 103/17 111/9 112/5 112/9 112/10 112/13 113/22 113/23 113/23 115/8 116/14 120/5 121/24 121/25 122/2 122/12 123/24 132/22 132/23 133/2 133/4 160/21 166/24 194/16 194/21 197/23 198/4 198/20 200/20 201/11 209/18 210/2 210/6 210/6 211/15 211/22 213/9 221/14 228/18 228/19 230/4</p> <p>gold [2] 49/25 93/3</p> <p>gone [3] 6/9 66/1 95/16</p> <p>good [35] 3/2 3/11 3/16 35/6 40/21 40/22 40/23 40/24 86/19 89/10 89/24 105/4 110/13 110/19 112/8 112/10 112/12 112/16 112/23 114/24 117/11 123/8 123/9 132/19</p> | <p>133/22 133/23 154/19 155/1 158/19 188/24 202/13 231/13 231/18 231/20 232/5</p> <p>good [2] 132/22</p> <p>Google [2] 205/14 205/16</p> <p>got [21] 22/7 49/24 71/15 79/18 95/13 96/3 101/1 111/19 113/5 115/7 115/9 118/6 118/23 132/9 146/13 166/23 178/18 197/24 207/12 212/9 215/1</p> <p>government [15] 4/23 35/21 60/16 82/23 140/15 144/16 144/19 190/12 191/3 195/19 196/10 196/13 198/7 201/14 232/2</p> <p>Government's [1] 67/15</p> <p>governor [1] 99/7</p> <p>grade [3] 110/12 110/18 110/21</p> <p>grades [3] 161/22 162/1 163/12</p> <p>gradually [2] 162/11 162/15</p> <p>graduate [19] 39/3 41/18 41/20 41/24 90/19 90/21 91/25 92/1 113/13 113/16 130/10 135/9 135/11 135/12 136/6 136/10 137/6 138/16 138/25</p> <p>graduates [2] 127/16 128/3</p> <p>graduating [2] 91/14 139/15</p> <p>Grady [1] 118/5</p> <p>graphic [2] 13/4 14/19</p> <p>graphical [1] 8/25</p> <p>Grasmeder [1] 50/23</p> <p>grateful [1] 127/5</p> <p>gray [1] 9/21</p> <p>great [15] 73/22 91/4 102/9 102/14 104/7 110/10 113/25 114/2 114/3 116/10 120/16 120/20 120/21 203/20 231/19</p> <p>greater [13] 6/21 6/22 6/23 6/24 10/1 10/5 34/16 34/18 37/20 62/23 112/25 113/1 114/21</p> <p>Greek [1] 17/11</p> <p>green [2] 178/22 178/23</p> <p>Greenbelt [1] 144/8</p> <p>Greg [1] 91/17</p> <p>grew [1] 117/6</p> <p>grievances [2] 22/17 22/23</p> <p>ground [9] 14/9 35/8 36/25 39/19 48/25 75/24 76/20 76/22 78/10</p> <p>grounds [1] 24/12</p> <p>group [43] 4/10 4/19 4/19 4/20 4/21 4/23 4/25 18/11 18/15 19/17 23/5 23/5 23/6 31/25 32/5 32/8 32/16 65/13 73/20 74/6 83/5 87/13 94/14 94/15 96/11 96/23 96/24 97/7 101/8 110/16 111/3 112/7 116/3 116/15 119/23 120/16 150/17 161/12 161/14 161/25 180/14 180/15 181/14</p> <p>groupings [1] 87/8</p> <p>groups [47] 4/7 4/14 4/19 18/7 19/18 19/20 22/8 22/14 22/18 22/21 23/1 23/4 23/12 24/2 31/6 31/15 32/23 47/10 51/19 54/10 60/17 61/22 62/4 63/20 64/4 69/11 69/15 72/24 72/25 73/3 73/5 73/11 73/15 73/17 81/22 82/14 83/22 87/8 87/14 120/5 120/7 151/14 152/2 164/1 180/13 180/20 180/23</p> <p>grouphink [2] 18/9 114/22</p> <p>grow [2] 104/7 164/15</p> <p>guarantee [1] 197/24</p> <p>Guard [9] 98/22 98/23 98/25 99/3 99/5 99/10 99/11 99/14 99/24</p> <p>guess [2] 10/20 130/6</p> <p>guest [1] 117/17</p> <p>guidance [2] 102/25 104/15</p> <p>guided [2] 93/21 96/14</p> <p>guided-missile [2] 93/21 96/14</p> <p>guidelines [2] 165/2 165/18</p> <p>Guinea [1] 64/8</p> <p>Gulf [7] 95/8 95/10 95/13 95/17 121/1 121/1 121/6</p> <p>gun [1] 14/13</p> <p>Gurreea [43] 2/10 133/6 133/7 133/15 133/22 136/6 143/21 145/2 145/18 146/3 146/15 147/9 147/23 151/15 159/21 161/7 162/7 162/23 163/20 164/18 166/10 166/18 168/17 168/23 169/4 171/2 175/12 182/3 186/9 186/23 187/10 187/18 188/17 189/11 191/23 192/10 192/13 203/25 204/1 206/3 210/13 226/14 228/6</p> <p>Gurreea's [1] 192/7</p> <p>guy [1] 181/4</p> <p>gymnastics [1] 120/12</p> | <p>96/19 96/21 97/6 97/7 100/6 100/18 113/20 113/24 114/10 116/17 120/9 120/14 120/15 120/22 120/29 126/4 126/7 126/13 141/3 141/24 193/10 202/9 204/5 205/4 214/8 224/19 225/25</p> <p>hadn't [1] 123/25</p> <p>hair [1] 109/3</p> <p>half [7] 65/5 66/1 79/3 79/5 144/22 191/5 201/13</p> <p>Hall [1] 126/5</p> <p>hallmark [1] 116/10</p> <p>hand [5] 3/5 26/12 89/13 133/10 153/3</p> <p>handbook [2] 139/11 206/20</p> <p>handling [6] 188/22 230/25 231/2 231/3 231/9 231/10</p> <p>hands [1] 35/14</p> <p>happen [4] 8/10 9/20 42/22 121/23</p> <p>happening [2] 7/5 24/14</p> <p>happens [3] 35/13 170/5 172/13</p> <p>happy [4] 117/19 123/3 194/18 197/21</p> <p>harassment [10] 25/21 25/24 26/3 26/8 27/3 28/25 29/9 29/11 29/19 30/2</p> <p>harassment/discrimination [3] 26/3 29/9 29/19</p> <p>hard [6] 26/13 112/17 113/24 114/2 114/3 125/17</p> <p>harder [1] 19/11</p> <p>harness [2] 19/24 20/25</p> <p>Harvard [39] 176/21 185/10 185/12 186/1 214/2 214/10 214/20 215/1 215/15 215/18 215/23 216/6 216/12 216/19 216/22 217/2 217/17 218/5 218/17 218/22 219/4 219/13 219/13 219/18 219/25 220/6 220/7 220/10 222/25 222/25 223/4 223/13 223/15 225/14 226/15 226/18 227/10 227/14 227/16</p> <p>Harvard's [6] 214/1 214/23 214/24 217/21 218/13 220/8</p> <p>has [105] 4/18 6/5 6/9 6/10 7/11 11/16 11/18 11/18 11/22 11/24 12/2 12/4 12/6 19/19 22/6 24/10 24/12 27/12 27/15 27/17 29/6 33/21 34/15 36/19 38/10 44/17 45/8 56/15 66/18 70/3 71/18 71/19 75/2 75/11 78/4 87/25 98/24 99/6 101/12 101/14 101/18 104/18 107/8 108/13 118/19 118/20 122/13 124/18 127/8 129/19 131/2 131/17 131/17 134/25 137/15 137/16 140/14 143/16 144/13 144/18 144/20 144/21 145/16 146/3 146/7 146/24 147/15 149/10 154/18 157/11 158/8 158/18 161/2 161/25 165/17 165/23 166/6 168/11 169/16 172/3 172/11 173/22 174/8 176/6 181/24 182/4 182/10 185/7 191/14 192/17 193/7 193/20 194/2 194/10 194/10 196/13 197/17 198/6 199/23 200/2 200/4 200/15 201/12 215/15 220/9</p> <p>hasn't [2] 101/17 129/6</p> <p>HASSON [1] 1/14</p> <p>hate [1] 51/14</p> <p>have [296]</p> <p>haven't [2] 191/6 192/21</p> <p>having [17] 18/17 21/8 36/2 54/9 73/15 82/3 88/2 98/4 114/22 116/25 121/18 121/18 134/17 159/17 171/13 201/13 202/23</p> <p>Hawaii [4] 94/14 97/12 97/13 97/17</p> <p>Hawaiians [2] 176/14 176/16</p> <p>Haynie [3] 16/23 18/21 27/19</p> <p>Haynie's [1] 23/7</p> <p>hazardous [1] 95/13</p> <p>he [159] 13/21 14/3 14/4 14/11 14/14 45/11 61/23 61/23 62/10 62/20 63/23 63/25 64/3 64/6 64/10 64/16 64/17 64/17 64/25 65/4 67/10 113/14 113/15 113/16 113/16 113/19 123/23 123/24 123/25 124/1 134/25 145/23 147/16 147/16 147/19 147/20 148/14 148/20 149/10 149/12 150/7 150/10 151/5 155/20 157/1 157/7 157/9 157/9 157/11 157/15 157/18 157/24 158/21 158/22 159/5 159/6 159/7 159/20 160/7 160/10 161/1 161/2 161/8 162/3 162/8 162/11 162/11 162/14 162/15 162/20 162/21 165/8 165/23 166/3 166/7 167/1 167/7 167/9 167/9 167/10 167/12 167/20 168/8 168/15 171/22 171/23 171/25 172/2 172/3 172/6 172/6 172/11 172/12 172/25 173/2 176/20 178/7 178/8 180/3 181/12 183/6 184/18 184/22 184/23 185/11 185/13 185/14 185/19 186/2 186/8 186/21 186/21 190/2 192/17 192/18 193/7 193/10 193/10 193/11 193/20 193/22 193/22 193/25</p> |
|---|---|--|

246

| | | |
|---|--|--|
| <p>I</p> <p>improper [1] 204/23</p> <p>improve [2] 105/23 134/21</p> <p>improved [3] 18/6 60/15 116/19</p> <p>improves [2] 68/10 68/15</p> <p>improving [1] 51/18</p> <p>inappropriate [1] 227/20</p> <p>incidents [2] 26/8 26/19</p> <p>include [8] 51/15 76/1 108/19 108/21 166/7 177/14 195/20 195/21</p> <p>included [11] 64/4 76/5 76/10 76/18 77/3 87/13 87/15 140/14 162/15 192/5 225/5</p> <p>includes [14] 72/6 72/8 72/11 83/5 165/22 166/4 177/8 199/12 199/24 199/24 217/23 218/7 221/10 221/15</p> <p>including [17] 32/7 35/1 82/15 83/23 112/1 114/14 116/19 116/24 140/20 142/1 186/15 187/2 199/2 199/8 210/25 221/21 221/23</p> <p>inclusion [22] 16/12 19/4 20/3 20/13 20/19 20/20 20/25 21/20 27/13 27/18 31/6 36/9 37/14 45/23 70/1 106/14 107/1 107/12 138/12 155/2 163/3 173/4</p> <p>inclusive [8] 13/12 13/18 14/21 17/4 17/12 19/8 19/14 19/23</p> <p>income [15] 164/5 165/3 165/3 165/23 165/23 165/24 165/25 165/25 166/14 166/19 166/24 167/8 167/10 195/13 199/12</p> <p>incomes [2] 164/13 164/24</p> <p>incomplete [4] 151/6 158/21 183/14 183/20</p> <p>incorporated [4] 138/5 139/17 156/7 158/18</p> <p>incorporates [2] 162/12 172/2</p> <p>increase [14] 6/20 53/25 54/4 55/3 55/10 57/7 58/11 58/18 59/9 59/14 85/8 114/12 119/4 181/15</p> <p>increased [6] 54/13 56/18 58/25 59/11 59/14 61/24</p> <p>increases [10] 9/25 19/21 34/3 54/2 54/5 57/19 58/12 119/24 162/15 162/19</p> <p>increasing [3] 57/18 183/17 210/14</p> <p>increasingly [2] 47/25 70/22</p> <p>incredible [2] 35/23 120/17</p> <p>incredibly [2] 14/14 14/14</p> <p>indeed [7] 44/6 68/17 87/14 165/12 188/23 189/14 213/25</p> <p>independence [2] 98/9 175/15</p> <p>independent [3] 149/20 168/25 169/23</p> <p>independently [2] 98/14 152/3</p> <p>index [9] 2/1 8/1 8/3 8/9 8/11 8/11 8/16 70/16 78/22</p> <p>India [1] 51/12</p> <p>Indian [4] 45/3 45/5 51/10 51/11</p> <p>Indians [3] 82/16 83/24 176/14</p> <p>indicate [4] 25/23 26/2 26/8 53/25</p> <p>indicated [4] 25/20 29/1 155/25 193/7</p> <p>indicates [1] 179/16</p> <p>indicator [1] 28/18</p> <p>individual [12] 81/22 95/21 95/24 109/7 109/8 122/15 124/25 150/24 166/7 180/5 181/25 221/17</p> <p>individually [1] 8/21</p> <p>individuals [12] 44/2 45/10 49/3 61/21 61/25 64/11 104/21 108/23 108/24 121/22 218/6 218/7</p> <p>indulge [1] 13/8</p> <p>industrial [5] 135/19 135/23 135/24 136/2 136/5</p> <p>industries [4] 140/23 140/25 141/3 141/4</p> <p>industry [5] 87/25 139/13 140/22 141/6 141/8</p> <p>inequality [67] 3/19 4/1 4/3 5/24 5/24 7/8 7/12 8/15 8/20 9/17 9/25 10/4 10/11 10/13 13/5 14/1 14/15 21/15 21/21 22/1 22/4 22/8 22/17 22/25 23/9 24/2 24/11 30/15 31/19 33/10 33/21 33/23 33/25 34/2 34/11 34/13 34/16 34/16 35/3 35/11 68/7 68/19 69/2 69/9 69/13 69/20 69/22 70/14 71/7 71/18 71/25 75/1 75/2 75/15 77/5 78/4 78/14 78/19 79/14 79/15 79/21 80/18 81/2 82/1 84/24 87/9 87/11</p> <p>infantry [1] 16/4</p> <p>infer [1] 161/4</p> <p>inflation [1] 166/2</p> <p>inflicting [1] 16/8</p> <p>inflicts [1] 6/22</p> <p>influence [2] 82/17 83/25</p> <p>influencers [2] 117/18 119/9</p> <p>inform [2] 77/25 143/8</p> | <p>information [60] 4/5 16/10 17/7 38/4 38/21 67/21 71/10 79/12 142/5 147/17 147/18 147/18 147/18 149/15 155/12 155/16 155/17 156/7 156/10 156/10 156/12 156/13 156/15 156/22 156/23 157/2 157/6 157/8 157/9 157/11 157/15 158/3 158/16 158/18 158/21 159/25 161/11 161/15 161/23 162/12 162/13 162/15 162/16 162/20 166/16 167/24 167/25 168/14 168/21 169/3 169/10 192/22 211/14 221/1 221/13 222/3 222/6 222/7 224/12 224/15</p> <p>informations [1] 37/21</p> <p>informative [2] 163/7 163/7</p> <p>informed [2] 77/9 168/20</p> <p>inherent [1] 49/7</p> <p>initial [4] 10/21 76/7 137/9 174/11</p> <p>initially [1] 141/5</p> <p>initiative [1] 104/5</p> <p>initiatives [2] 37/11 107/2</p> <p>innovate [1] 103/11</p> <p>innovation [2] 17/22 18/11</p> <p>innovative [1] 18/9</p> <p>input [1] 11/3</p> <p>insertion [2] 109/17 109/25</p> <p>inside [14] 8/10 8/19 17/6 19/15 21/7 22/4 22/5 22/6 23/19 31/15 37/11 70/6 79/22 213/7</p> <p>insight [1] 113/16</p> <p>insights [1] 104/21</p> <p>inspect [2] 90/13 121/7</p> <p>inspecting [1] 101/6</p> <p>inspection [1] 204/21</p> <p>inspector [5] 90/1 90/10 90/11 95/3 130/16</p> <p>instance [4] 4/15 5/3 26/25 208/18</p> <p>instances [5] 4/13 4/14 20/10 87/4 189/23</p> <p>instead [2] 98/24 226/6</p> <p>institution [1] 18/19</p> <p>institutional [1] 141/5</p> <p>institutions [1] 62/4</p> <p>instructions [1] 121/17</p> <p>instruments [2] 110/11 110/14</p> <p>insurgents [1] 38/25</p> <p>integrate [1] 17/5</p> <p>Integrated [1] 94/22</p> <p>integration [1] 46/21</p> <p>intended [4] 218/17 218/23 219/5 220/1</p> <p>intensely [3] 38/15 38/16 105/24</p> <p>intensity [1] 16/2</p> <p>intensive [1] 35/23</p> <p>intent [2] 28/20 218/24</p> <p>intention [2] 28/19 30/4</p> <p>interact [1] 49/4</p> <p>interaction [1] 227/3</p> <p>interactions [2] 37/17 49/15</p> <p>interdependence [22] 169/24 170/21 170/24 171/8 171/17 171/21 171/23 172/10 172/16 172/24 173/8 173/12 174/9 174/10 174/17 174/25 175/3 175/17 227/5 227/12 227/19 227/22</p> <p>interdependent [5] 170/1 170/6 170/12 171/7 175/13</p> <p>interest [7] 108/11 108/13 108/19 109/12 193/21 200/17 201/12</p> <p>interested [4] 119/9 119/11 221/20 221/23</p> <p>interesting [11] 15/1 35/12 37/23 113/3 113/15 117/17 118/2 120/4 120/25 121/18 122/9</p> <p>interests [5] 110/2 196/18 200/2 217/24 218/25</p> <p>interethnic [1] 86/2</p> <p>Intergroup [1] 63/10</p> <p>international [8] 37/24 66/16 119/25 120/22 120/24 122/1 122/17 122/18</p> <p>internationally [2] 108/18 120/17</p> <p>interpret [6] 136/5 143/12 187/15 199/16 199/18 199/18</p> <p>interpretation [11] 65/4 142/22 150/13 152/13 153/16 154/20 167/18 180/18 200/25 201/1 202/10</p> <p>interpreted [1] 185/21</p> <p>interpreting [2] 152/17 179/25</p> <p>interprets [1] 199/7</p> <p>interracial [1] 86/2</p> <p>interrupt [2] 135/3 211/19</p> <p>intervals [1] 11/1</p> <p>interview [4] 42/16 42/18 113/14 156/16</p> <p>interviewing [1] 141/7</p> | <p>interviews [3] 62/6 126/23 127/1</p> <p>introduction [1] 42/2</p> <p>intuitive [2] 165/21 165/29</p> <p>invaded [1] 77/21</p> <p>investigate [1] 90/13</p> <p>investigating [2] 37/16 101/6</p> <p>involve [1] 26/9</p> <p>involved [5] 39/4 95/18 138/17 138/19 143/17</p> <p>involves [1] 45/14</p> <p>involving [1] 88/7</p> <p>inward [1] 23/18</p> <p>Iraq [3] 37/24 38/11 38/18</p> <p>Iraqi [1] 94/8</p> <p>Iraqis [1] 94/9</p> <p>Irish [5] 15/7 15/11 73/21 73/25 74/2</p> <p>Irish-born [1] 15/7</p> <p>irrelevant [1] 182/14</p> <p>irrespective [1] 47/13</p> <p>is [770]</p> <p>Islanders [1] 176/15</p> <p>isn't [10] 19/13 22/22 22/22 68/3 82/4 130/4 131/20 181/20 212/21 218/2</p> <p>isolated [1] 48/1</p> <p>issue [10] 124/19 130/17 131/18 152/17 154/21 167/18 169/9 169/9 187/21 227/5</p> <p>issues [8] 24/11 66/20 90/14 107/7 116/9 138/12 220/16 227/24</p> <p>it [370]</p> <p>it'll [1] 105/15</p> <p>it's [198] 3/24 4/5 4/17 5/2 5/18 6/7 8/5 8/6 9/2 9/10 9/10 10/7 11/17 12/18 16/10 20/15 24/2 24/2 26/13 28/11 29/20 30/19 31/4 33/8 33/14 42/4 49/1 49/3 51/11 52/4 53/3 59/24 60/7 60/8 69/3 69/14 69/24 71/4 73/22 74/9 75/16 79/24 80/3 80/8 80/10 81/25 82/12 86/12 87/24 98/10 101/20 101/22 101/23 102/4 107/9 109/2 109/4 109/19 109/25 110/6 110/7 110/12 111/13 112/2 112/2 112/4 113/3 117/3 117/22 117/23 118/1 118/8 118/8 118/8 118/23 120/1 120/4 122/2 122/2 125/8 125/17 125/24 126/4 127/24 128/10 128/13 129/15 129/15 129/16 129/21 134/11 134/17 134/23 134/23 137/2 137/4 137/12 137/16 137/22 138/2 138/4 138/5 140/5 140/9 140/14 140/16 140/20 143/3 146/10 147/25 148/9 148/16 148/22 149/1 150/19 152/16 152/19 153/5 153/21 155/16 155/23 156/11 158/9 159/5 159/16 160/12 161/3 162/13 163/10 163/13 165/22 166/24 167/18 168/16 168/17 169/9 172/17 173/14 176/2 176/3 178/6 179/6 179/8 179/9 180/11 180/19 183/3 183/22 185/23 186/14 186/19 186/24 193/2 193/13 193/14 193/19 193/19 195/24 196/10 196/25 197/2 198/4 199/5 199/20 200/12 200/13 200/23 201/1 201/3 201/25 203/7 206/16 207/2 207/2 208/8 210/12 210/23 212/5 212/12 212/14 212/20 213/11 214/5 215/17 215/18 221/2 224/25 225/3 225/12 225/24 226/2 226/3 227/7 227/7 228/13 228/17 228/17 230/4</p> <p>Italian [3] 73/21 74/10 86/23</p> <p>its [33] 6/9 6/11 6/25 6/25 17/4 17/4 17/4 17/5 17/6 24/17 24/18 36/23 36/24 42/23 62/8 75/7 75/8 75/13 77/4 98/24 104/6 107/24 110/16 138/1 139/20 153/18 170/18 207/20 208/19 208/21 215/23 216/12 218/18</p> <p>itself [12] 10/13 11/4 19/3 34/1 40/2 52/1 53/7 54/16 68/10 68/16 69/14 165/15</p> <p>J</p> <p>J-A-S-O-N [1] 3/10</p> <p>J-O-H-N [1] 89/18</p> <p>J5 [2] 94/17 100/6</p> <p>Jakiba [1] 3/3</p> <p>JAMES [1] 1/14</p> <p>January [3] 83/12 83/16 84/9</p> <p>January 1st [1] 84/9</p> <p>January 2021 [1] 83/16</p> <p>Japan [1] 93/21</p> <p>Japanese [1] 74/20</p> <p>Jason [2] 2/5 3/9</p> <p>Jefferson [1] 69/25</p> <p>JTAMDO [1] 94/21</p> <p>job [6] 90/9 99/21 101/8 105/25 154/19 155/1</p> <p>jobs [3] 93/10 94/19 95/1</p> <p>Joe [1] 190/8</p> |
|---|--|--|

| | | |
|--|---|---|
| <div>J</div> <div>jog [1] 74/11</div> <div>JOHN [4] 1/19 2/7 89/18 113/16</div> <div>join [2] 117/13 119/23</div> <div>joined [4] 6/11 35/21 135/8 139/16</div> <div>joint [15] 94/19 94/21 94/23 95/1 97/19 97/20 97/22 97/25 97/25 98/1 98/4 99/14 99/24 100/17 118/5</div> <div>Joseph [1] 46/2</div> <div>JOSHUA [1] 1/17</div> <div>journal [8] 160/16 185/12 206/7 206/8 206/17 206/17 206/19 206/25</div> <div>journals [4] 12/3 142/8 206/25 207/2</div> <div>JRO [1] 94/23</div> <div>JROTC [1] 117/21</div> <div>judged [1] 114/7</div> <div>judgment [2] 82/19 83/16</div> <div>judgments [1] 10/24</div> <div>judicial [2] 27/9 233/10</div> <div>jump [2] 7/15 200/25</div> <div>June [1] 90/17</div> <div>junior [6] 58/19 58/20 59/10 111/3 113/9 117/16</div> <div>jury [1] 204/5</div> <div>just [161] 3/23 5/2 5/17 5/18 7/2 7/6 8/5 8/14 9/2 9/7 9/8 10/13 11/7 12/9 13/4 14/9 15/20 16/17 19/6 19/17 20/11 20/15 21/9 23/15 25/16 26/19 29/12 31/10 33/25 35/4 36/6 40/16 40/25 42/25 43/16 44/11 48/8 48/12 49/10 49/13 51/11 51/21 52/6 52/13 52/20 57/3 58/10 59/8 60/6 65/25 66/5 68/16 70/3 70/20 70/24 72/16 80/2 80/6 80/21 83/8 86/19 88/17 98/13 98/17 99/8 99/12 99/18 101/19 102/11 103/9 105/4 109/4 110/13 113/3 113/19 113/21 113/24 114/5 117/11 117/21 118/22 120/7 120/9 120/18 120/18 122/9 124/24 125/3 127/12 131/1 131/7 132/21 134/22 134/23 134/25 137/18 140/23 148/24 151/17 152/19 152/20 152/25 154/13 157/6 159/13 160/7 160/8 160/12 162/13 162/19 163/15 165/2 165/5 166/13 169/1 173/14 174/1 175/20 177/15 178/18 179/6 179/8 180/2 180/24 181/19 184/23 185/25 186/6 186/23 188/1 189/20 189/21 191/24 192/7 193/10 193/19 196/2 197/17 198/1 198/9 198/10 201/2 201/17 202/14 207/10 207/15 208/3 211/2 212/25 215/18 217/19 218/6 220/5 223/4 223/10 224/13 224/21 225/1 228/11 228/18 230/17</div> <div>Justice [3] 145/2 202/1 229/24</div> <div>justifies [1] 160/25</div> <div>K</div> <div>Kahlenberg [3] 164/11 165/9 167/4</div> <div>Kahlenberg's [1] 167/7</div> <div>Kandahar [2] 38/19 38/19</div> <div>Kauai [1] 97/17</div> <div>keep [7] 14/2 16/7 54/17 150/15 150/20 163/6 207/10</div> <div>keeping [1] 36/20</div> <div>keeps [2] 111/21 211/23</div> <div>Ken [1] 220/2</div> <div>kept [2] 123/18 178/11</div> <div>key [3] 19/3 20/7 22/19</div> <div>keys [1] 17/4</div> <div>khalifa [1] 13/17</div> <div>kids [1] 117/21</div> <div>killed [1] 14/18</div> <div>killing [4] 6/7 7/14 7/20 9/11</div> <div>kind [18] 8/9 10/3 12/3 19/3 33/2 37/11 111/6 113/24 114/8 117/19 118/24 120/7 120/9 130/17 152/6 156/13 195/20 225/13</div> <div>kinds [4] 19/7 33/1 38/3 39/11</div> <div>kinetic [4] 36/21 38/15 39/14 95/16</div> <div>knew [4] 120/13 120/13 120/18 121/14</div> <div>know [77] 15/5 15/5 20/11 24/16 27/12 28/17 34/5 35/6 41/24 42/19 61/1 61/7 72/18 72/18 73/17 73/20 84/11 84/16 95/23 102/12 102/15 105/1 113/21 115/16 118/5 119/15 119/18 122/9 125/6 125/8 129/11 131/12 134/10 134/14 134/16 157/18 161/17 163/9 163/11 163/12 163/13 185/1 186/17 186/25 187/7 190/21 190/25 191/2 191/4 191/16 200/3 200/5 202/20 208/24 210/11 210/11 212/19 212/23 213/7 214/5 215/14 215/20 215/22 216/22 217/17 218/17 219/12 220/25 221/15 221/19 223/15 223/15 225/15 225/25 226/4 227/9 229/5</div> | <div>knowing [1] 125/23</div> <div>knowledge [3] 27/6 137/10 228/21</div> <div>known [1] 11/23</div> <div>known [2] 75/7 203/13</div> <div>knows [1] 194/15</div> <div>Koreans [1] 74/20</div> <div>L</div> <div>L-Y-A-L-L [1] 3/10</div> <div>lab [2] 65/9 67/14</div> <div>labeled [2] 103/13 176/16</div> <div>Labor [1] 164/3</div> <div>lack [4] 62/10 141/15 166/15 179/1</div> <div>lacked [1] 70/13</div> <div>lacking [1] 82/17</div> <div>lacks [1] 187/20</div> <div>land [3] 97/13 98/10 98/18</div> <div>land-based [1] 98/10</div> <div>landscape [1] 106/1</div> <div>language [5] 17/8 48/16 48/24 49/7 49/10</div> <div>languages [1] 19/10</div> <div>large [20] 19/7 24/2 24/17 29/18 29/20 30/6 30/9 34/12 56/24 56/25 57/16 69/1 70/22 78/17 92/25 97/16 118/11 150/15 150/21 208/17</div> <div>large-deck [1] 92/25</div> <div>large-scale [1] 24/17</div> <div>larger [4] 59/6 109/8 149/1 180/22</div> <div>last [31] 3/8 6/13 28/12 36/5 36/18 37/6 37/8 38/12 58/3 58/4 89/16 91/19 101/13 101/24 102/1 103/18 122/5 124/8 128/1 133/12 133/14 144/20 156/17 187/9 187/10 187/11 190/1 190/15 193/4 203/5 208/25</div> <div>lasted [2] 17/3 189/15</div> <div>late [3] 88/23 174/7 188/20</div> <div>late-afternoon [1] 188/20</div> <div>late-morning [1] 88/23</div> <div>later [4] 109/20 129/11 132/23 216/21</div> <div>Latino [1] 73/19</div> <div>Latino/Hispanic [1] 73/19</div> <div>Latinos [3] 74/13 82/15 83/23</div> <div>LATTA [20] 1/22 129/18 129/18 129/19 129/19 142/1 156/17 164/22 165/18 166/12 173/6 174/5 174/14 211/9 213/8 214/18 220/25 221/8 221/19 222/5</div> <div>Latta's [1] 153/14</div> <div>latter [1] 207/17</div> <div>laughing [1] 203/17</div> <div>laughter [1] 124/2</div> <div>launched [1] 87/25</div> <div>launching [1] 115/12</div> <div>laundry [1] 126/6</div> <div>laureate [2] 138/3 213/17</div> <div>law [3] 131/12 131/13 206/17</div> <div>lawsuit [6] 202/19 202/20 202/22 203/5 203/6 203/7</div> <div>lawyers [3] 128/22 140/17 196/4</div> <div>lead [7] 20/10 21/7 64/11 92/18 104/7 109/16 109/18</div> <div>leader [2] 13/15 94/21</div> <div>leaders [4] 26/9 36/1 54/10 55/18</div> <div>leadership [21] 26/15 40/9 54/1 54/5 55/5 55/7 55/11 55/17 56/3 56/7 56/10 57/8 57/19 58/11 58/18 59/9 59/16 104/3 112/8 115/12 115/18</div> <div>leading [5] 16/25 32/3 34/14 82/5 87/22</div> <div>leads [4] 14/14 47/11 112/7 166/19</div> <div>learn [2] 40/7 114/8</div> <div>learned [1] 202/2</div> <div>least [13] 6/8 18/3 74/23 83/21 93/7 95/6 132/12 134/11 160/15 168/7 174/15 184/5 219/23</div> <div>led [5] 43/22 60/15 66/16 111/3 111/7</div> <div>left [12] 9/8 9/13 9/25 26/12 56/16 58/10 93/3 153/3 222/23 223/9 224/21 224/23</div> <div>left-hand [2] 26/12 153/3</div> <div>legal [3] 46/22 140/17 143/21</div> <div>Legion [1] 96/1</div> <div>legitimacy [3] 18/18 21/5 60/16</div> <div>length [1] 230/2</div> <div>LER [1] 7/6</div> <div>LES [1] 101/1</div> <div>less [15] 26/1 26/4 43/23 44/2 65/1 113/22 123/2 127/21 127/22 144/22 165/24 173/23 179/14 179/19 230/15</div> <div>lessons [1] 40/7</div> <div>let [10] 28/17 148/24 153/11 159/12 182/21 197/20 198/12 198/19 206/15 216/1</div> <div>let's [66] 23/21 24/24 43/16 44/11 54/16</div> | <div>54/24 56/13 57/16 58/8 61/18 62/18 63/5 66/6 134/23 136/21 147/23 151/15 151/16 154/15 155/11 157/13 157/17 159/10 159/11 160/13 162/6 162/22 163/19 164/17 164/25 165/13 166/9 167/3 167/14 167/14 169/11 170/22 171/6 171/15 172/14 173/11 175/2 175/19 177/1 179/23 180/16 180/17 182/2 182/8 183/9 184/12 184/13 185/4 187/13 187/17 189/17 198/10 207/10 210/2 216/2 217/8 217/19 218/16 219/7 230/17</div> <div>lethal [3] 16/6 23/10 37/19</div> <div>lethality [1] 50/10</div> <div>lethally [1] 111/23</div> <div>letter [1] 12/16</div> <div>letters [4] 156/15 156/18 156/20 184/19</div> <div>level [20] 4/3 5/12 5/24 7/8 7/11 9/17 14/15 27/25 71/25 74/25 82/17 84/1 93/9 104/4 150/12 176/2 180/13 223/17 223/19 226/21</div> <div>levels [7] 13/22 14/1 22/7 37/3 39/14 78/12 164/15</div> <div>lieutenant [3] 91/17 91/23 128/19</div> <div>life [8] 22/12 29/4 29/4 29/7 29/10 101/12 174/5 218/8</div> <div>lift [2] 103/17 103/18</div> <div>light [1] 12/20</div> <div>like [48] 5/8 10/15 12/3 12/4 13/4 15/6 15/16 19/12 29/25 31/8 36/5 39/10 45/22 61/11 71/11 77/2 79/1 81/6 88/4 102/11 110/20 113/7 116/15 117/3 118/18 118/19 118/19 118/22 119/19 119/22 120/8 120/11 123/1 125/16 127/4 131/12 134/22 151/6 157/6 184/3 194/19 194/23 197/11 209/13 215/3 220/22 223/4 227/7</div> <div>liked [1] 121/13</div> <div>likelihood [12] 6/21 6/23 6/24 6/24 7/5 10/1 10/5 34/3 34/18 56/18 61/22 65/18</div> <div>likely [32] 25/23 26/1 26/2 26/4 26/19 26/21 27/10 50/13 65/20 66/1 67/8 88/14 155/16 157/11 157/23 158/4 159/8 161/5 163/21 164/10 164/15 165/14 166/24 167/11 179/15 207/8 208/22 211/6 212/14 212/15 213/11 213/15</div> <div>limitation [2] 158/19 226/4</div> <div>limited [9] 43/17 75/23 137/16 147/20 171/9 172/19 172/21 215/11 215/15</div> <div>limits [2] 99/23 101/25</div> <div>Lincoln [1] 70/12</div> <div>Linday [1] 46/2</div> <div>LINDSEY [1] 1/23</div> <div>line [10] 7/8 9/22 10/10 25/13 28/22 28/23 71/15 72/22 92/14 92/15</div> <div>lines [6] 12/1 13/20 16/3 88/10 90/13 188/15</div> <div>linguistic [1] 68/3</div> <div>list [3] 38/8 72/24 157/5</div> <div>listed [7] 72/22 73/15 73/20 184/19 189/22 228/24 229/1</div> <div>listen [1] 121/25</div> <div>listing [1] 17/24</div> <div>lists [2] 33/4 78/2</div> <div>literally [5] 66/1 148/10 160/19 203/5 208/13</div> <div>literature [7] 34/12 34/17 35/13 51/14 205/21 220/11 225/20</div> <div>litigation [2] 143/15 144/18</div> <div>little [26] 12/9 26/13 28/5 28/22 44/20 45/6 55/21 59/18 60/13 62/25 68/6 70/15 75/17 75/22 79/5 81/17 90/18 104/10 110/1 122/3 134/21 149/14 155/9 182/8 203/17 203/18</div> <div>littoral [1] 92/24</div> <div>live [1] 164/13</div> <div>lived [1] 126/5</div> <div>living [1] 83/6</div> <div>load [1] 123/21</div> <div>local [9] 17/6 17/7 37/1 37/19 38/21 38/25 48/25 49/1 49/4</div> <div>locally [1] 115/7</div> <div>locate [1] 80/3</div> <div>logic [1] 209/21</div> <div>logistically [2] 50/7 50/13</div> <div>logit [34] 136/17 136/18 136/19 136/21 136/22 137/1 137/2 137/9 137/10 137/20 137/24 138/14 142/23 143/2 143/5 143/7 143/18 149/19 168/24 169/14 169/20 169/22 214/22 215/7 216/18 218/13 219/24 220/6 225/16 225/20 226/15 226/20 226/22 227/20</div> <div>long [8] 17/3 41/6 92/7 105/22 111/8</div> |
|--|---|---|

| | | |
|---|---|--|
| L | Malian [1] 66/21 | means [20] 6/6 6/8 7/13 7/20 8/16 8/18 18/2 51/4 97/25 107/4 107/13 113/6 119/13 133/10 124/18 124/25 157/24 166/23 210/7 216/25 |
| long... [3] 117/16 234/1 279/5 | Mallians [4] 65/7 66/12 67/3 67/6 | meant [2] 185/15 205/5 |
| long-term [1] 105/22 | man [3] 107/12 124/18 124/25 157/24 | measure [21] 31/6 65/14 68/3 69/14 77/12 148/12 148/13 148/16 157/25 158/10 158/24 158/25 159/17 165/23 166/4 166/8 166/24 178/2 179/9 211/22 211/22 |
| longer [5] 48/2 86/13 101/4 184/7 184/10 | managed [2] 13/13 16/19 | measured [3] 32/19 38/2 212/6 |
| look [52] 4/6 7/6 19/17 21/6 24/24 25/10 26/7 28/15 30/9 31/8 37/5 37/5 54/16 58/15 62/20 63/2 97/13 101/1 107/10 109/15 113/6 116/14 117/22 117/25 119/21 120/8 120/10 120/11 120/12 151/5 155/24 157/17 158/12 160/13 163/19 169/19 170/10 170/22 171/6 171/15 172/14 173/11 174/13 177/21 183/4 184/3 185/4 187/17 188/1 197/25 217/8 219/7 | management [1] 106/2 | measurement [2] 148/11 166/19 |
| looked [11] 3/18 3/24 7/22 25/6 28/12 31/24 88/8 100/6 120/15 220/22 225/4 | managing [3] 16/22 45/23 134/4 | measures [7] 6/2 7/22 70/25 72/9 87/23 167/10 212/18 |
| looking [26] 4/17 5/15 6/1 9/3 10/3 10/13 15/1 15/2 27/17 29/12 52/11 52/24 52/24 52/25 63/2 63/21 67/20 70/16 90/14 103/9 198/22 224/2 224/7 224/13 225/2 231/17 | manifest [1] 6/19 | mechanics [1] 67/13 |
| looks [3] 90/11 113/7 116/15 | manned [2] 99/9 101/21 | mechanism [1] 66/10 |
| loop [3] 109/19 181/19 186/23 | manner [1] 47/3 | mechanisms [2] 62/8 63/1 |
| lopsided [1] 14/15 | manning [1] 73/8 | Medal [4] 95/25 95/25 96/1 96/1 |
| lose [2] 14/17 210/3 | many [34] 4/7 16/25 26/8 39/15 41/24 48/2 69/6 74/18 95/5 97/5 100/21 108/24 109/18 110/11 127/19 128/13 131/12 131/14 131/15 142/9 143/18 143/24 144/3 164/7 167/25 173/21 181/18 191/2 192/3 192/4 205/3 206/2 206/9 215/19 | MEDHA [1] 1/19 |
| losing [4] 6/6 7/13 7/20 9/10 | March [1] 202/25 | Mediterranean [2] 95/9 95/11 |
| loss [16] 6/5 7/2 7/3 7/7 7/9 7/23 9/9 9/24 10/2 13/6 14/20 16/18 37/7 181/16 209/8 210/21 | marginal [6] 178/2 178/8 178/15 178/20 179/2 182/23 | medium [9] 5/25 6/18 7/11 8/7 33/13 33/15 54/1 54/25 57/10 |
| loss-exchange [12] 6/5 7/2 7/3 7/7 7/9 7/23 9/9 9/24 10/2 13/6 14/20 16/18 | Marine [6] 39/21 45/9 76/19 91/17 103/1 128/19 | medium-size [1] 57/10 |
| losses [2] 7/19 181/23 | Marines [5] 31/11 38/17 39/13 39/25 39/25 | meet [3] 66/18 105/5 106/18 |
| lot [15] 39/19 111/14 112/9 129/6 129/12 129/16 133/3 140/14 163/9 166/1 169/3 189/18 190/9 228/13 228/19 | maritime [3] 94/9 98/8 100/10 | meets [1] 14/11 |
| lots [4] 13/3 95/17 98/8 155/14 | marked [8] 16/9 40/5 54/18 146/4 146/7 146/24 215/2 225/7 | Melody [1] 142/1 |
| low [14] 5/25 6/17 7/8 8/15 16/10 33/13 33/14 62/5 65/17 69/9 69/12 75/14 75/16 165/3 | markets [4] 105/25 138/21 204/13 204/25 | meltdown [1] 35/18 |
| lower [10] 16/18 22/13 22/25 69/21 71/9 113/24 164/13 164/15 164/24 210/21 | markets [1] 135/24 | member [2] 91/16 144/24 |
| lowest [7] 71/7 71/25 75/5 78/3 78/6 78/7 84/25 | Mars [20] 3/17 5/22 9/5 11/4 11/11 19/16 21/17 30/13 30/22 34/6 40/1 70/24 71/12 75/23 76/3 76/12 76/25 77/4 77/12 78/2 | members [18] 4/10 25/5 25/19 25/23 25/25 25/25 26/2 26/3 26/5 28/14 61/22 68/21 85/14 85/17 85/22 142/3 173/9 191/7 |
| Luckily [1] 205/20 | Mars's [1] 80/17 | memorized [1] 127/24 |
| lumped [2] 74/23 86/22 | MARYLAND [5] 1/1 1/6 131/13 144/8 233/6 | memory [1] 73/12 |
| lunch [2] 123/1 230/21 | Masiello [2] 91/17 91/23 | MENDEZ [1] 1/20 |
| Lyall [30] 2/5 3/3 3/9 3/10 3/11 3/16 5/10 9/1 9/3 15/18 17/25 21/13 21/25 24/6 26/18 29/21 30/13 33/3 33/7 33/18 36/6 36/11 40/12 40/21 52/12 68/8 80/5 85/3 86/19 88/19 | masks [2] 222/3 222/6 | mention [2] 10/9 48/9 |
| Lyall 6 [1] 17/25 | Mason [8] 93/22 93/25 94/2 96/9 96/13 96/14 96/20 121/14 | mentioned [11] 10/19 18/6 20/1 28/5 37/12 96/8 96/23 116/18 123/13 140/23 191/7 |
| M | mass [8] 6/8 6/10 6/23 6/24 7/23 7/23 9/12 9/13 | mentored [1] 118/17 |
| machine [1] 14/12 | massive [1] 181/12 | mentoring [1] 118/18 |
| made [18] 12/7 24/10 24/12 71/2 90/25 94/13 114/5 122/18 138/20 161/1 171/2 171/10 186/15 200/4 216/7 227/6 227/10 227/23 | master [2] 92/3 92/4 | mere [1] 188/7 |
| magnify [1] 69/2 | master's [1] 135/14 | merely [2] 49/16 125/22 |
| magnitude [8] 29/15 30/9 148/6 157/23 157/25 180/1 181/16 213/10 | material [3] 22/20 63/9 177/22 | Merit [2] 96/1 233/4 |
| Mahdiyya [4] 13/9 13/14 13/21 14/17 | materials [3] 40/17 147/5 214/14 | Meritorious [1] 95/25 |
| main [5] 63/18 95/10 136/14 152/11 182/14 | math [11] 31/18 32/25 100/23 161/25 163/10 163/11 163/12 181/4 190/14 191/6 192/22 | met [5] 60/18 123/11 139/1 169/21 189/13 |
| maintain [8] 92/18 92/21 98/20 105/21 106/9 107/16 162/18 182/18 | mathematics [3] 135/21 137/23 138/1 | method [2] 50/6 176/21 |
| maintenance [1] 112/11 | matter [12] 1/9 120/6 122/13 124/19 129/3 133/4 151/22 198/10 199/21 200/13 204/10 233/9 | methodological [2] 149/17 150/3 |
| major [2] 94/21 219/5 | matters [5] 68/21 90/11 99/25 102/1 228/15 | methodology [4] 50/4 80/22 145/7 145/16 |
| majority [2] 150/16 181/22 | Maxim [1] 14/12 | methods [3] 142/20 145/10 145/13 |
| major's [2] 174/15 227/17 | maximize [1] 36/24 | metric [1] 26/4 |
| make [44] 11/7 30/21 30/25 31/6 66/5 99/20 100/19 105/3 106/8 106/10 106/11 107/14 107/16 109/21 109/23 111/22 115/16 115/22 117/20 118/20 120/19 125/24 126/14 128/18 130/13 132/11 160/19 161/20 162/5 163/6 169/20 170/3 170/4 184/2 187/4 187/5 199/17 201/1 208/22 215/23 217/19 230/23 231/5 231/13 | may [49] 3/12 19/10 19/12 23/2 24/15 26/24 47/13 64/11 88/19 89/6 89/21 105/13 115/7 115/8 117/5 117/6 122/1 127/13 127/13 128/5 130/7 131/9 132/19 133/17 161/22 161/24 161/25 173/23 176/7 184/6 184/8 188/1 189/7 192/9 196/18 198/5 198/8 200/11 201/17 202/6 203/21 204/3 206/13 206/18 207/19 207/20 214/5 228/21 229/1 | metrics [2] 164/7 178/1 |
| maker [1] 184/21 | May 26 [1] 105/13 | Mexican [1] 74/15 |
| makers [3] 135/25 141/8 141/22 | maybe [10] 26/11 32/11 43/16 79/5 86/11 110/14 132/12 155/9 172/21 230/12 | mic [5] 4/1 5/3 9/18 52/9 135/1 |
| makes [17] 23/18 61/21 69/3 105/1 105/4 106/7 117/11 161/8 161/18 162/2 162/3 163/9 172/6 173/16 191/18 216/12 219/25 | MCCARTHY [5] 1/15 194/15 194/25 195/2 200/11 | MICHAEL [1] 1/13 |
| making [12] 37/2 100/20 100/25 122/15 136/1 138/23 143/6 147/22 153/19 156/18 160/25 193/18 | me [72] 12/14 12/16 12/25 13/8 28/17 42/11 43/18 44/22 49/25 50/15 64/14 68/8 69/20 71/6 74/7 78/2 79/20 79/24 89/13 91/4 96/20 96/22 102/11 102/11 107/8 113/13 113/15 113/25 114/6 117/21 122/16 126/6 135/25 138/16 140/18 142/19 143/9 147/5 148/24 153/11 159/13 181/4 182/21 191/24 194/10 196/8 197/20 197/21 198/12 198/18 198/19 199/20 200/10 201/1 201/25 202/12 205/4 205/8 205/9 206/4 206/15 212/9 212/22 212/23 216/1 216/2 221/5 222/17 222/23 223/3 225/23 231/19 | MICHEAL [1] 1/23 |
| male [4] 46/12 121/12 122/11 122/13 | mean [32] 15/23 32/10 45/9 47/18 48/8 48/12 71/18 77/15 79/18 88/12 93/3 97/24 110/5 119/7 128/19 130/6 131/9 134/12 140/8 148/9 153/17 155/3 166/22 170/2 178/14 179/5 179/13 180/10 184/14 187/16 199/7 200/25 | microeconomic [1] 140/1 |
| male-dominated [2] 121/12 122/11 | meaning [3] 137/3 138/6 170/20 | Microeconomics [1] 185/13 |
| Mali [12] 60/14 61/24 63/11 63/22 64/1 64/11 64/23 66/15 66/16 66/17 67/4 67/14 | meanings [1] 107/8 | microphone [3] 134/12 134/14 134/19 |
| | | middle [5] 57/22 62/21 80/14 82/12 94/14 |
| | | midpoint [4] 5/6 41/4 41/5 41/9 |
| | | midshipmen [2] 210/22 212/7 |
| | | might [18] 8/5 18/10 29/17 35/5 35/8 103/16 122/18 129/11 130/8 131/15 132/11 194/4 210/14 211/2 212/8 212/9 212/18 218/24 |
| | | militaries [2] 23/14 87/3 |
| | | military [133] 3/21 4/1 4/8 5/24 8/6 8/8 8/11 8/23 10/13 14/15 14/22 17/1 17/9 17/12 18/19 19/18 20/2 21/8 21/21 22/4 22/6 22/9 22/14 23/1 23/8 23/17 23/20 24/7 24/10 24/17 27/6 27/9 27/12 28/8 28/21 29/2 29/3 29/4 29/6 29/10 30/14 30/15 30/18 31/1 31/7 31/15 31/19 31/21 32/23 33/10 33/21 33/23 33/25 34/2 34/10 34/15 34/18 34/21 34/25 35/3 35/10 41/1 41/12 43/2 43/6 43/9 43/19 44/3 44/8 44/25 45/14 46/11 46/13 47/24 50/10 50/23 50/24 50/25 51/8 51/13 51/17 68/7 68/10 68/14 68/18 69/1 69/12 69/14 69/15 69/20 69/22 70/22 71/18 72/25 75/2 75/13 75/15 76/4 78/3 78/14 78/16 78/19 78/23 79/9 79/10 79/13 79/14 79/15 79/21 80/17 81/2 82/1 84/24 84/24 85/9 85/14 87/11 90/5 91/1 91/10 92/6 94/4 97/15 98/1 99/25 102/2 105/2 127/10 129/1 129/24 130/10 131/14 131/17 |
| | | military's [2] 59/21 78/21 |
| | | Miller [5] 228/22 228/25 229/14 231/3 231/10 |
| | | million [2] 191/5 201/14 |
| | | mind [6] 3/7 82/20 89/13 147/23 150/20 |

| | | |
|--|--|--|
| M | Moreover [2] 58/17 62/24 | mutual [1] 19/13 |
| mind... [1] 1563/6 | morning [9] 3/2 3/11 3/16 39/25 40/21 40/8 40/9 40/12 40/10 | my [112] 3/9 12/15 12/16 13/1 15/21 20/7 21/17 21/18 21/19 32/25 33/21 |
| minds [1] 38/13 | MORTARA [23] 1/12 2/11 145/21 188/22 189/4 192/15 194/13 195/23 197/17 199/23 200/9 200/14 200/21 201/11 201/16 203/22 204/3 204/9 228/3 229/15 229/21 231/8 231/23 | 51/16 55/17 60/3 66/1 67/9 73/6 89/18 91/1 91/1 91/1 91/9 91/14 93/4 93/8 93/12 93/14 93/19 94/7 100/7 101/1 101/1 101/6 108/6 111/2 112/21 113/12 113/14 113/21 114/1 114/6 114/9 116/2 119/19 123/20 125/16 126/6 126/19 127/18 127/23 129/8 130/14 134/6 134/11 135/10 136/9 138/10 138/19 140/1 140/3 140/3 141/21 142/3 142/5 142/6 143/5 144/21 144/22 144/22 147/6 148/2 148/6 150/4 150/4 151/2 151/9 151/19 152/13 153/16 153/21 157/22 158/9 164/2 174/10 187/11 195/9 195/12 195/14 195/15 196/9 196/19 198/5 201/23 202/2 202/17 206/14 206/19 210/19 213/8 218/5 220/20 221/3 222/15 223/10 224/25 225/3 225/5 228/21 229/8 230/16 231/14 |
| mine's [2] 65/23 66/1 | Mortara's [1] 194/9 | myself [7] 91/24 117/25 118/25 141/5 157/14 168/13 179/11 |
| mini [1] 203/13 | mortgage [2] 204/17 204/22 | |
| minorities [17] 28/2 35/17 78/12 78/16 78/20 79/2 81/5 81/13 84/22 129/22 130/1 130/7 130/12 130/20 150/16 180/3 221/14 | most [33] 14/15 14/19 32/12 37/7 38/16 41/16 44/22 44/24 51/8 51/13 64/18 64/20 64/25 65/2 66/15 75/10 79/25 82/13 83/11 109/23 115/5 118/4 137/2 137/12 137/13 137/22 138/5 141/23 145/15 190/15 208/25 225/13 228/13 | |
| minority [20] 26/1 27/2 28/3 31/25 32/16 51/19 54/4 54/10 54/11 55/4 57/18 58/11 59/14 82/8 83/5 149/11 180/23 182/23 210/3 210/22 | mother [1] 91/1 | |
| minority/nonminority [1] 54/11 | motion [3] 192/8 192/14 200/4 | |
| minus [6] 212/7 212/7 212/19 212/20 212/20 212/20 | Motors [1] 128/18 | |
| minute [3] 88/23 188/24 198/10 | move [10] 6/17 6/21 32/1 52/6 134/25 145/17 146/23 192/6 198/15 202/4 | |
| minutes [11] 86/11 123/3 123/5 150/25 188/21 188/25 189/15 224/22 229/7 230/6 230/7 | moved [2] 42/9 201/20 | |
| misattribute [1] 211/16 | movement [3] 36/2 129/6 163/3 | |
| misattribution [1] 149/12 | moving [3] 57/22 203/14 210/25 | |
| mischaracterized [1] 38/13 | Mr [12] 2/6 2/6 2/8 2/11 2/11 2/12 3/15 56/15 86/6 197/1 226/13 231/23 | |
| misinterpreted [1] 202/2 | Mr. [82] 3/12 27/20 40/14 40/15 40/21 42/25 44/13 45/9 47/22 52/12 54/17 55/22 61/7 63/17 80/2 80/5 80/8 85/3 86/7 86/20 87/17 88/6 88/16 88/17 89/7 89/21 103/16 103/16 108/9 122/21 131/25 133/17 134/22 145/21 164/11 165/9 167/4 167/7 188/19 188/22 189/4 192/15 194/8 194/9 194/13 194/15 194/25 195/2 195/3 195/23 197/17 198/18 199/5 199/23 200/9 200/11 200/14 200/21 201/11 201/16 203/2 203/3 203/22 203/24 204/3 204/9 207/12 220/20 221/4 223/10 226/10 228/2 228/3 229/3 229/15 229/21 230/25 231/3 231/8 231/10 231/19 231/20 232/1 | |
| misleading [5] 151/7 180/18 180/19 183/14 183/21 | Mr. Carmichael [7] 89/7 89/21 103/16 108/9 122/21 131/25 231/3 | |
| miss [1] 167/11 | Mr. Gardner [16] 133/17 134/22 188/19 194/8 195/3 199/5 203/2 207/12 220/20 223/10 226/10 228/2 229/3 230/25 231/20 232/1 | |
| missed [1] 112/10 | Mr. Gardner's [1] 203/3 | |
| missile [4] 93/21 94/22 96/14 100/10 | Mr. Kahlenberg [3] 164/11 165/9 167/4 | |
| missiles [1] 115/12 | Mr. Kahlenberg's [1] 167/7 | |
| missing [1] 176/19 | Mr. Lyall [4] 40/21 52/12 80/5 85/3 | |
| mission [3] 36/9 66/17 105/5 | Mr. McCarthy [4] 194/15 194/25 195/2 200/11 | |
| missions [3] 67/17 109/10 121/4 | Mr. Mortara [20] 145/21 188/22 189/4 192/15 194/13 195/23 197/17 199/23 200/9 200/14 200/21 201/11 201/16 203/22 204/3 204/9 228/3 229/15 229/21 231/8 | |
| mistakes [1] 10/23 | Mr. Mortara's [1] 194/9 | |
| mistreatment [1] 78/12 | Mr. Nomikos [2] 61/7 63/17 | |
| misunderstanding [2] 197/13 224/19 | Mr. Pusterla [6] 44/13 47/22 54/17 55/22 80/2 80/8 | |
| mitigate [2] 114/22 115/2 | Mr. Robinson [6] 3/12 40/14 42/25 86/7 88/16 203/24 | |
| mix [2] 39/1 155/18 | Mr. Spears [1] 198/18 | |
| mixed [9] 38/2 38/6 112/22 112/24 113/2 113/5 113/8 120/11 121/18 | Mr. Strawbridge [8] 40/15 86/20 87/17 88/6 88/17 221/4 231/10 231/19 | |
| mixed-gender [6] 112/22 112/24 113/2 113/5 113/8 121/18 | Mr. Vazirani [1] 27/20 | |
| mobilize [1] 24/5 | Mr. Weiss [1] 45/9 | |
| model [90] 136/15 136/17 136/19 136/20 136/21 136/22 136/22 137/1 137/2 137/6 137/9 137/10 137/13 137/15 137/16 137/20 137/21 137/24 138/14 138/18 138/24 139/2 139/7 139/7 141/24 143/2 143/10 143/13 143/16 143/18 143/19 145/9 147/15 149/19 149/20 149/23 150/9 152/14 153/22 153/24 154/2 154/3 154/17 154/19 155/1 155/6 155/20 156/6 157/8 158/18 158/18 158/24 159/16 162/12 165/21 167/2 167/24 168/12 168/24 169/1 169/2 169/14 169/20 169/22 169/24 169/25 170/9 170/25 172/3 175/14 175/18 184/18 184/23 185/6 186/1 186/3 186/3 186/19 186/24 213/4 213/7 214/22 215/7 218/13 219/24 220/6 226/15 226/20 226/22 227/20 | Mrs. [1] 231/2 | |
| Model 6 [1] 167/2 | Mrs. Gargeya [1] 231/2 | |
| modeled [3] 139/1 152/16 169/23 | Ms [5] 2/9 133/8 134/16 134/21 203/15 | |
| modeling [13] 139/5 139/5 140/9 142/13 143/6 143/11 143/14 143/17 144/11 145/19 169/18 172/1 183/20 | Ms. [6] 122/22 122/25 132/3 134/11 231/3 231/10 | |
| models [11] 137/9 138/11 142/20 142/22 142/23 143/5 143/7 143/14 143/20 225/17 225/20 | Ms. Miller [2] 231/3 231/10 | |
| modern [21] 15/22 15/23 15/25 16/9 16/13 16/15 17/16 32/1 36/8 36/13 36/16 37/9 39/2 39/5 39/7 39/9 39/15 39/18 39/19 40/1 60/5 | Ms. Thomas [2] 122/25 134/11 | |
| modernize [2] 103/11 106/2 | Ms. Wyrick [2] 122/22 132/3 | |
| module [1] 136/18 | much [26] 36/21 36/21 38/4 40/14 59/6 87/8 103/19 103/20 109/3 113/3 132/14 133/3 149/25 161/4 168/6 180/22 180/22 190/19 191/3 191/12 191/14 192/19 200/11 228/9 228/18 232/8 | |
| moment [4] 13/9 16/16 40/16 216/2 | multiple [13] 8/7 11/18 16/15 17/20 18/11 18/15 80/16 96/21 110/24 173/4 173/7 177/5 177/20 | |
| money [1] 65/13 | multiples [1] 96/3 | |
| month [1] 93/6 | multiplier [1] 209/9 | |
| months [3] 25/21 144/21 190/17 | multiracial [13] 150/8 176/4 177/5 177/18 177/19 178/11 178/24 220/15 220/17 221/16 221/22 221/24 222/1 | |
| morale [1] 22/13 | music [1] 110/19 | |
| more [72] 6/6 6/17 6/22 7/4 7/13 7/20 8/22 8/22 9/10 12/9 12/20 18/9 18/10 20/3 22/10 25/23 26/2 26/25 27/10 29/9 32/2 34/17 36/2 36/21 36/21 37/6 37/18 40/3 43/23 54/9 59/2 61/21 62/5 67/17 87/8 96/4 112/23 113/3 114/19 115/24 122/3 136/12 143/18 143/19 143/25 149/14 149/17 149/25 150/3 150/25 162/15 162/16 164/9 164/10 164/10 164/15 165/14 166/24 169/1 169/13 173/14 181/9 181/18 183/18 183/25 190/5 191/5 226/8 228/13 228/21 230/6 230/14 | must [3] 105/22 106/19 162/18 | |

| | | |
|--|--|--|
| <p>N</p> <p>Netherlands [1] 64/4</p> <p>networks [1] 23/19</p> <p>neutral [1] 67/4</p> <p>never [11] 41/1 42/14 60/17 69/15 124/5 124/9 219/23 220/5 220/20 225/16 225/19</p> <p>new [8] 12/6 13/15 13/17 16/22 26/4 34/7 124/19 125/4</p> <p>next [39] 29/3 46/16 46/20 47/2 47/6 57/17 64/16 66/6 67/2 81/18 83/21 83/21 88/25 89/7 93/19 93/22 95/23 97/11 139/15 155/11 155/24 157/17 158/12 159/4 163/19 164/17 164/25 165/13 166/9 170/25 177/8 181/8 182/2 188/4 188/7 190/1 215/8 221/13 229/13</p> <p>nice [1] 118/23</p> <p>Niger [3] 64/8 64/23 65/2</p> <p>nine [3] 41/3 41/6 95/6</p> <p>no [98] 1/4 12/24 20/5 20/9 30/16 34/22 42/20 43/15 45/13 48/2 48/11 48/14 50/13 51/9 54/15 57/9 62/13 65/2 67/14 68/16 77/8 79/23 82/16 85/19 87/20 88/12 88/18 98/23 99/11 101/4 112/22 115/14 115/15 115/21 122/20 127/1 127/7 129/10 129/15 131/6 131/6 131/22 132/2 132/5 137/18 139/24 141/1 141/3 141/12 142/25 144/14 144/20 145/22 147/4 152/1 160/6 161/2 161/18 162/5 162/25 165/17 166/6 168/25 170/16 173/5 174/3 174/10 175/1 175/11 176/25 177/10 183/1 184/7 184/10 185/10 186/12 188/13 193/24 195/23 198/6 199/20 200/18 208/13 209/12 212/11 213/2 215/4 220/5 222/8 226/8 226/16 227/15 227/18 228/1 228/4 229/20 229/23 230/6</p> <p>Nobel [4] 138/3 213/17 214/4 220/5</p> <p>noisy [1] 166/23</p> <p>Nomikos [5] 61/4 61/4 61/7 61/12 63/17</p> <p>nomination [3] 91/8 91/9 91/10</p> <p>nominations [3] 227/2 227/2 227/14</p> <p>nominees [1] 172/19</p> <p>non [15] 27/9 31/4 31/11 31/14 31/22 32/23 54/5 58/12 58/20 59/11 63/20 82/14 83/22 110/6 151/23</p> <p>non-BCA [1] 151/23</p> <p>non-Black [1] 58/20</p> <p>non-Hispanic [3] 54/5 58/12 59/11</p> <p>non-Navy [1] 110/6</p> <p>non-Tuareg [1] 63/20</p> <p>non-White [7] 31/4 31/11 31/14 31/22 32/23 82/14 83/22</p> <p>non-Whites [1] 27/9</p> <p>nondiverse [2] 115/13 115/19</p> <p>none [5] 44/24 69/6 70/9 76/4 231/24</p> <p>Nonetheless [1] 66/8</p> <p>nonminority [1] 54/11</p> <p>nonplebe [1] 151/23</p> <p>nonprofits [1] 140/15</p> <p>nonracial [3] 173/15 174/4 217/9</p> <p>nontestifying [1] 194/22</p> <p>NORAD [2] 94/18 100/5</p> <p>normal [1] 12/18</p> <p>normalizing [1] 126/10</p> <p>normally [1] 81/1</p> <p>norms [1] 66/19</p> <p>NORRIS [1] 1/14</p> <p>NORTHCOM [1] 100/6</p> <p>NORTHERN [2] 1/2 94/18</p> <p>Northwestern [6] 135/11 135/12 135/13 137/7 139/15 160/18</p> <p>not [282]</p> <p>note [4] 10/6 161/3 161/9 163/1</p> <p>noted [3] 128/15 128/16 218/5</p> <p>notes [7] 46/16 47/2 56/16 64/3 129/8 156/16 164/9</p> <p>nothing [12] 22/10 40/12 42/11 42/19 42/21 78/14 78/19 86/5 88/15 185/23 225/12 232/2</p> <p>noticeably [1] 151/24</p> <p>noticed [1] 8/4</p> <p>noting [1] 164/12</p> <p>notation [1] 224/12</p> <p>now [62] 5/8 7/12 11/22 13/25 15/1 15/16 17/14 19/25 21/12 23/15 23/16 35/12 36/5 37/2 37/17 37/23 52/4 57/13 57/16 58/8 59/18 61/7 86/13 86/14 89/3 92/6 101/22 102/17 103/19 105/7 108/5 108/6 119/21 123/13 129/18 130/16 133/4 138/2 139/14 146/18 150/1 150/11 151/15 155/25 159/4 161/15 161/20 172/6 179/16 185/5 189/1 190/11 190/19 192/12 196/16 198/13</p> | <p>201/25 207/7 215/6 216/3 228/6 232/9</p> <p>nuclear [1] 204/14</p> <p>numbers [145] 19/7 19/19 19/20 19/20 19/20 44/14 73/2 78/15 85/9 100/25 105/2 118/10 121/16 129/25 130/12 130/19 171/9 172/19 179/19 180/19 180/20 180/24 181/3 181/5 181/23 182/10 183/3 184/1 184/18 186/15 199/13 215/15 219/18</p> <p>numbers [23] 11/5 12/15 15/7 31/18 47/12 78/16 130/2 130/11 131/18 150/21 179/6 179/12 187/25 188/1 188/2 192/16 198/22 198/23 213/1 213/2 213/2 215/21 231/12</p> <p>numeric [2] 87/14 152/22</p> <p>O</p> <p>O'CONNOR [1] 1/23</p> <p>objected [1] 12/7</p> <p>objection [1] 150/4</p> <p>objections [1] 147/4</p> <p>objectives [1] 107/17</p> <p>observable [4] 136/25 160/20 162/12 162/13</p> <p>observables [5] 161/5 161/5 161/14 163/7 208/10</p> <p>Observational [1] 66/14</p> <p>observe [20] 148/21 155/2 157/10 157/15 159/8 159/9 161/10 161/11 161/16 161/21 161/21 161/24 162/4 162/4 163/3 168/14 168/14 178/4 187/4 188/1</p> <p>observed [7] 137/3 154/9 154/14 154/25 162/18 162/20 208/9</p> <p>observing [1] 154/22</p> <p>obtained [2] 91/20 152/6</p> <p>obtaining [1] 44/2</p> <p>obviously [9] 17/2 22/13 26/23 59/6 149/25 182/17 184/9 216/18 229/15</p> <p>occupy [1] 20/24</p> <p>occurred [1] 76/15</p> <p>October [3] 103/1 202/20 202/22</p> <p>October 2021 [1] 103/1</p> <p>October 5 [1] 202/22</p> <p>odds [1] 6/19</p> <p>off [11] 3/21 52/9 65/23 65/24 73/6 98/6 101/22 131/12 131/15 178/6 182/9</p> <p>offenders [1] 26/14</p> <p>offer [4] 80/6 104/19 145/3 173/23</p> <p>offered [3] 79/8 91/4 177/22</p> <p>offering [10] 33/19 85/12 85/15 85/16 85/19 85/20 85/24 85/25 117/1 136/8</p> <p>offers [4] 172/9 174/21 178/25 216/7</p> <p>office [4] 25/7 25/8 94/4 94/23</p> <p>officer [62] 20/21 50/9 54/11 58/8 58/16 58/19 58/20 59/10 59/11 59/15 67/17 78/21 78/23 92/13 92/14 92/16 93/4 93/5 93/13 93/23 94/3 94/8 96/9 97/22 99/17 99/23 101/5 108/12 108/13 108/15 109/3 109/13 109/20 109/25 110/2 111/7 111/24 112/1 112/7 113/9 113/12 113/25 114/5 114/11 114/25 115/25 116/19 116/22 118/4 118/12 118/15 119/4 119/24 120/1 121/14 130/18 130/21 131/19 196/7 196/8 196/11 202/9</p> <p>officers [32] 20/24 21/1 21/6 21/8 22/11 23/4 23/4 26/9 43/19 44/3 48/1 54/3 54/6 55/6 55/18 58/13 58/25 59/1 59/3 92/17 92/17 92/21 109/15 109/16 109/18 111/4 126/1 126/14 127/15 127/16 127/19 128/2</p> <p>official [5] 81/3 81/5 81/14 233/1 233/16</p> <p>officials [3] 141/7 141/25 222/4</p> <p>often [5] 17/11 23/13 23/19 39/3 47/11</p> <p>oftentimes [1] 15/12</p> <p>Oh [6] 44/21 45/13 51/21 63/6 190/7 210/10</p> <p>oil [1] 94/9</p> <p>okay [42] 5/21 9/4 42/6 48/9 48/15 49/19 52/5 52/21 53/4 53/21 57/5 57/23 60/3 61/11 86/11 86/14 102/16 103/12 103/19 104/9 105/6 108/4 125/3 125/8 125/20 125/25 135/2 192/8 192/14 194/3 196/12 197/12 198/3 198/16 204/8 209/22 210/5 214/9 223/7 223/25 224/8 232/5</p> <p>Olympics [1] 120/9</p> <p>omissions [1] 158/4</p> <p>omits [1] 158/3</p> <p>omitted [2] 155/23 169/4</p> <p>once [4] 113/4 126/9 215/24 219/24</p> <p>one [114] 8/3 8/5 8/12 9/21 9/21 10/9 12/6 14/16 14/18 14/19 16/2 17/4 17/10 19/3 19/16 20/7 20/8 20/9 20/9 20/15</p> | <p>22/16 22/19 23/2 23/4 23/24 23/25 25/1 25/3 25/12 25/19 27/20 28/10 31/9 31/14 34/19 36/18 36/23 39/24 42/22 49/1 50/3 51/7 51/13 55/24 61/12 65/2 65/20 66/2 67/15 69/17 72/9 73/20 75/10 79/9 79/16 80/12 96/25 97/11 103/13 103/18 104/12 105/2 107/9 109/6 109/14 112/16 113/18 117/10 118/10 119/21 129/9 133/1 134/24 136/15 137/9 137/12 137/18 137/22 137/25 139/3 150/14 151/16 153/11 159/10 161/12 171/8 171/10 172/21 173/5 176/8 178/1 180/11 180/14 181/20 181/20 184/5 188/4 189/22 190/1 190/4 190/7 190/8 207/23 215/13 216/2 216/15 220/13 220/16 224/23 226/22 226/23 227/1</p> <p>one's [1] 106/14</p> <p>one-star [1] 96/25</p> <p>ones [6] 14/16 24/2 113/6 113/8 114/10 157/6</p> <p>online [1] 63/7</p> <p>only [41] 14/11 19/3 20/8 20/15 30/22 38/13 50/4 51/4 51/14 51/15 53/14 60/18 65/20 66/2 70/16 73/20 76/18 76/22 87/9 101/6 104/19 115/20 124/24 125/13 125/14 129/9 153/9 155/15 156/11 159/2 163/7 167/9 170/24 177/6 179/16 181/14 199/24 199/24 211/21 214/14 221/21</p> <p>OPA [5] 27/17 27/20 31/9 79/13 79/22</p> <p>opening [2] 76/8 222/15</p> <p>operate [15] 92/17 92/21 93/1 98/14 98/15 98/15 98/19 100/19 101/5 107/9 111/12 111/19 111/23 112/5 112/6</p> <p>operated [1] 97/14</p> <p>operates [1] 82/23</p> <p>operating [9] 62/15 98/6 109/16 110/23 111/8 111/13 111/21 112/25 122/8</p> <p>operation [4] 72/11 72/14 72/20 135/24</p> <p>operationally [2] 122/6 122/8</p> <p>operations [18] 34/25 36/24 38/9 38/10 38/12 38/15 39/1 39/4 40/3 44/9 48/16 95/15 95/18 100/13 101/18 106/23 111/6 118/4</p> <p>opine [3] 99/25 102/1 102/9</p> <p>opinion [100] 15/20 15/21 16/12 16/16 17/14 17/15 20/3 20/6 20/7 21/12 21/14 21/15 21/18 21/21 26/18 31/19 33/21 36/5 36/7 36/8 41/12 44/7 54/9 60/4 80/4 83/1 85/7 85/12 85/15 85/16 85/19 85/20 85/24 85/25 117/15 119/19 120/24 147/6 148/1 148/2 148/6 149/15 149/16 149/17 149/18 149/25 150/1 150/4 150/4 150/11 150/12 151/1 151/2 151/8 151/9 151/18 151/19 152/12 153/15 153/16 164/8 164/12 165/19 167/14 168/23 169/1 169/11 169/12 169/13 169/15 175/13 175/19 175/21 179/23 179/24 179/25 180/16 181/10 181/19 182/2 182/3 182/8 183/10 183/19 186/24 187/9 187/10 187/11 207/7 207/11 207/17 209/24 212/25 215/6 215/6 216/17 220/16 222/24 226/14 227/19</p> <p>Opinion 2 [1] 216/17</p> <p>opinions [21] 15/16 15/19 33/19 39/20 45/20 59/19 59/20 66/12 136/7 138/9 142/16 143/8 145/3 147/9 147/10 147/12 147/24 151/16 207/5 216/15 220/13</p> <p>OPNAV [2] 94/1 94/12</p> <p>opportunities [5] 23/20 91/4 109/9 112/10 115/3</p> <p>opportunity [6] 15/13 23/23 25/4 46/23 114/21 141/24</p> <p>opposed [2] 73/21 137/15</p> <p>opposite [2] 158/10 188/8</p> <p>optimistic [1] 61/21</p> <p>optimistically [1] 41/8</p> <p>options [2] 4/9 118/21</p> <p>orchestra [3] 110/9 111/2 112/16</p> <p>order [5] 14/10 36/15 87/13 106/3 106/18</p> <p>orders [3] 87/2 121/22 122/3</p> <p>ordnance [1] 119/13</p> <p>Oregon [1] 125/5</p> <p>organization [13] 21/5 37/21 94/22 97/1 98/11 112/12 118/11 135/19 135/23 135/24 136/2 136/5 193/20</p> <p>organizations [4] 18/17 110/25 136/1 140/15</p> <p>organize [1] 231/12</p> <p>organized [3] 99/8 99/12 110/16</p> <p>organizing [1] 24/3</p> <p>orient [1] 9/7</p> <p>Oster [1] 163/17</p> |
|--|--|--|

| | | | |
|-----------------------------|---|--|--|
| O | | | |
| other [78] | 5/7 6/11 7/14 7/22 10/14 11/11 11/6 11/8 11/17 13/2 14/18 16/8 19/11 19/12 19/12 19/25 25/6 25/25 28/7 31/24 34/10 35/10 45/14 50/15 60/17 62/4 62/7 62/25 63/20 64/7 73/21 96/2 110/18 110/25 115/9 116/11 120/3 124/6 124/10 124/19 126/7 129/17 140/16 142/2 145/14 148/23 154/13 164/7 170/6 171/24 176/14 179/19 185/2 185/18 185/24 190/4 191/25 199/3 199/10 199/11 199/12 199/22 199/25 200/1 201/3 201/5 201/6 205/8 210/24 211/1 211/15 213/9 216/15 220/13 220/15 226/23 229/18 229/21 | | |
| others [4] | 193/6 193/10 193/12 228/22 | | |
| our [46] | 11/1 11/22 22/20 22/22 22/22 32/1 36/19 50/6 58/17 74/25 82/3 87/23 103/13 103/23 103/24 104/1 104/19 105/2 105/2 105/4 105/5 105/15 105/23 106/2 106/22 106/23 106/24 107/16 107/25 109/20 116/4 116/10 117/13 120/21 121/3 121/6 121/15 121/22 122/16 140/17 158/7 158/23 188/20 194/22 223/8 229/6 | | |
| ourselves [1] | 9/7 | | |
| ouster [2] | 76/5 76/7 | | |
| out [36] | 9/12 10/6 13/13 15/6 22/5 32/4 35/17 38/25 48/12 61/22 75/22 78/23 81/15 86/23 93/21 106/12 111/9 115/10 115/10 120/5 120/7 120/11 121/4 129/12 164/23 165/4 184/23 192/11 199/23 200/19 201/6 206/9 220/5 223/15 225/14 228/18 | | |
| out-groups [1] | 61/22 | | |
| outcome [10] | 33/2 77/5 77/10 77/25 137/3 137/3 154/25 155/3 162/18 225/20 | | |
| outcomes [10] | 33/25 136/18 136/20 137/1 137/16 137/17 137/18 142/24 154/17 225/17 | | |
| outset [1] | 70/23 | | |
| outside [5] | 23/17 114/23 116/6 143/1 204/6 | | |
| over [40] | 18/5 40/8 41/22 70/22 71/2 73/23 74/1 88/22 94/9 101/12 101/24 116/16 126/10 129/21 131/13 134/2 140/12 140/19 142/3 142/9 144/15 144/20 144/20 151/11 157/5 166/2 166/2 172/7 181/13 193/1 193/4 201/13 212/7 212/8 214/17 218/4 219/1 225/11 228/11 230/23 | | |
| overall [8] | 12/22 25/11 25/19 26/1 88/10 130/2 144/22 225/3 | | |
| overcome [2] | 18/16 104/19 | | |
| overestimated [2] | 207/25 213/12 | | |
| overestimating [1] | 209/19 | | |
| Overlord [4] | 72/11 72/14 72/20 73/7 | | |
| overreport [1] | 26/19 | | |
| overstate [1] | 207/8 | | |
| overstated [5] | 149/7 153/21 159/5 211/6 212/15 | | |
| overstates [1] | 149/4 | | |
| overstating [2] | 158/11 163/22 | | |
| overwhelmed [2] | 114/25 116/12 | | |
| overwhelming [1] | 65/7 | | |
| own [16] | 4/15 6/14 6/25 9/14 13/13 48/21 86/24 98/24 114/1 126/6 148/15 159/3 159/19 183/23 213/8 213/9 | | |
| owned [1] | 97/14 | | |
| Oxford [1] | 11/23 | | |
| P | | | |
| p.m [6] | 89/5 132/18 132/18 189/3 189/3 232/11 | | |
| P800 [1] | 53/17 | | |
| pace [1] | 203/12 | | |
| Pacific [4] | 94/14 95/9 95/10 176/15 | | |
| pack [1] | 110/1 | | |
| package [1] | 200/5 | | |
| packages [3] | 138/5 138/6 138/6 | | |
| page [75] | 2/4 25/10 26/7 28/15 44/13 44/14 44/20 46/8 46/20 47/2 47/21 47/22 48/4 48/5 49/19 49/22 51/24 52/2 52/3 52/4 52/12 52/13 52/20 52/24 52/25 53/2 53/3 54/24 55/22 56/14 57/6 57/17 58/9 59/10 59/24 59/25 60/3 60/3 60/6 61/16 62/18 62/20 63/13 64/16 67/2 67/19 71/22 73/4 79/23 79/24 80/2 80/6 80/8 80/10 80/15 103/4 103/5 103/9 103/12 104/11 104/11 105/14 105/15 106/12 189/21 190/1 190/7 214/17 216/4 217/20 218/4 218/21 219/17 221/13 233/9 | | |
| page 10 [1] | 62/20 | | |
| page 13 [2] | 105/14 105/15 | | |
| page 15 [1] | 106/12 | | |
| page 18 [1] | 80/10 | | |
| page 20 [1] | 28/11 41/8 | | |
| page 22 [5] | 52/4 52/20 53/2 53/3 218/4 | | |
| page 23 [3] | 26/7 60/6 216/4 | | |
| page 24 [5] | 51/24 52/2 52/3 52/13 52/24 | | |
| page 25 [1] | 59/24 | | |
| page 3 [2] | 28/15 46/8 | | |
| page 4 [3] | 47/21 47/22 103/4 | | |
| page 5 [2] | 63/13 103/12 | | |
| page 52 [1] | 218/21 | | |
| page 57 [1] | 219/17 | | |
| page 6 [1] | 217/20 | | |
| page 60 [1] | 56/14 | | |
| page 61 [1] | 55/22 | | |
| page 8 [3] | 44/13 44/14 49/22 | | |
| page back [1] | 73/4 | | |
| page down [1] | 44/20 | | |
| page here [1] | 103/9 | | |
| page in [1] | 79/24 | | |
| page of [1] | 189/21 | | |
| page that [1] | 67/19 | | |
| page through [1] | 80/2 | | |
| page where [1] | 103/5 | | |
| pages [1] | 60/8 | | |
| paid [2] | 16/20 193/25 | | |
| paper [8] | 45/14 45/17 45/19 47/2 47/6 49/23 63/18 206/7 | | |
| papers [3] | 67/20 68/1 197/24 | | |
| parachuted [2] | 194/11 194/14 | | |
| paragraph [29] | 25/11 44/17 44/23 46/16 49/20 50/17 50/19 51/20 51/21 51/25 52/11 52/18 56/1 57/22 58/3 58/4 60/11 61/4 62/21 66/6 67/21 80/15 81/18 82/13 198/21 198/22 217/21 218/4 219/17 | | |
| paragraph 11 [1] | 217/21 | | |
| paragraph 117 [1] | 219/17 | | |
| paragraph 41 [1] | 218/4 | | |
| paragraph after [1] | 82/13 | | |
| paragraph at [1] | 52/11 | | |
| paragraph down [1] | 46/16 | | |
| paragraph of [1] | 44/23 | | |
| paragraph that [3] | 44/17 49/20 51/25 | | |
| paragraph that's [1] | 50/19 | | |
| paragraph there [1] | 25/11 | | |
| paragraph you [1] | 61/4 | | |
| PARALEGAL [2] | 1/22 1/23 | | |
| parameter [1] | 199/25 | | |
| parameters [1] | 98/6 | | |
| parent [1] | 164/16 | | |
| parenthetical [1] | 179/3 | | |
| parents [2] | 117/18 119/8 | | |
| parity [8] | 6/6 7/6 7/7 7/9 7/13 7/19 9/10 14/20 | | |
| part [41] | 19/3 35/3 37/10 39/3 40/1 41/16 44/23 44/24 48/17 48/23 56/6 62/13 64/18 73/7 83/3 98/25 99/5 104/14 109/4 109/8 121/11 124/8 135/16 136/9 136/13 137/6 137/8 140/2 154/12 168/7 168/15 177/6 190/17 198/9 211/6 216/17 220/17 221/21 222/3 222/6 225/3 | | |
| participant [2] | 194/11 194/13 | | |
| participants [2] | 62/4 141/8 | | |
| participate [1] | 70/13 | | |
| participated [2] | 78/4 193/12 | | |
| participation [2] | 68/23 76/19 | | |
| particular [21] | 4/12 4/22 5/3 5/6 6/4 10/8 12/14 12/20 18/15 26/25 38/23 39/16 50/20 65/13 87/23 103/15 124/6 124/9 165/23 185/16 195/17 | | |
| particularly [3] | 36/18 99/16 138/9 | | |
| parties [6] | 194/16 194/17 194/20 194/23 197/11 228/25 | | |
| partners [2] | 35/5 100/8 | | |
| parts [2] | 73/8 210/25 | | |
| pass [1] | 188/18 | | |
| passes [1] | 13/16 | | |
| past [4] | 101/15 140/12 140/19 206/8 | | |
| pathologies [4] | 8/5 8/7 8/13 24/15 | | |
| PATRICK [1] | 1/13 | | |
| patrol [1] | 60/18 | | |
| patrols [1] | 38/1 | | |
| pattern [3] | 9/22 10/3 11/8 | | |
| pay [1] | 95/13 | | |
| payments [1] | 197/11 | | |
| PDF [3] | 52/3 52/23 59/24 | | |
| peace [1] | 63/19 | | |
| peacekeepers [23] | 37/6 61/21 61/24 62/3 62/6 62/11 62/14 63/22 63/25 64/12 64/18 65/1 65/6 65/7 65/18 65/19 66/9 66/13 | | |
| 66/15 66/17 66/23 67/4 67/6 | | | |
| peacekeeping [16] | 36/16 36/18 36/23 37/6 37/7 37/8 37/12 37/16 60/15 60/18 60/23 62/15 62/24 63/10 64/4 66/19 | | |
| peer [13] | 12/3 205/4 205/5 205/20 206/1 206/2 206/3 206/4 206/10 206/12 206/21 220/10 225/19 | | |
| peer-reviewed [6] | 12/3 205/4 205/20 206/3 220/10 225/19 | | |
| peers [9] | 53/25 54/10 55/4 55/10 56/2 57/7 59/14 59/16 205/5 | | |
| pegs [1] | 83/12 | | |
| people [65] | 19/7 19/12 25/7 26/24 29/13 75/13 85/9 97/15 101/15 101/19 101/22 102/7 103/13 103/22 103/23 105/2 105/4 105/15 105/16 106/13 107/11 107/24 107/25 109/1 111/19 112/8 114/15 114/15 114/16 116/3 116/6 116/10 116/11 116/12 117/4 117/10 117/12 118/2 118/6 119/11 119/16 119/16 119/17 119/17 119/19 119/22 120/7 120/15 120/17 125/20 125/22 126/6 128/5 128/6 130/8 130/19 142/2 142/4 173/21 191/25 196/18 202/24 216/7 216/8 216/20 | | |
| per [2] | 165/24 166/5 | | |
| perceive [1] | 67/3 | | |
| perceived [4] | 63/19 65/17 66/24 66/24 | | |
| percent [43] | 4/20 4/21 6/8 6/10 7/9 7/12 7/16 7/18 25/20 25/22 25/23 25/25 26/1 26/4 26/15 30/1 30/5 30/5 31/4 31/4 59/5 59/5 64/22 64/23 65/1 87/16 119/15 127/15 128/3 129/21 130/25 153/4 153/6 166/2 174/15 174/20 178/13 179/14 181/13 181/15 183/18 188/5 227/16 | | |
| percentage [14] | 4/7 29/20 56/19 57/7 57/20 58/3 58/17 58/19 59/12 59/15 188/6 200/6 200/18 200/19 | | |
| percentages [1] | 225/12 | | |
| perceptions [3] | 60/15 62/7 62/22 | | |
| perfect [1] | 113/5 | | |
| perform [3] | 23/9 35/4 78/8 | | |
| performance [18] | 3/20 6/3 8/3 8/16 16/13 19/19 19/22 20/1 20/8 21/21 21/22 36/10 37/14 68/10 68/18 110/17 112/17 114/12 | | |
| performed [2] | 38/6 144/16 | | |
| perhaps [7] | 14/15 23/5 42/5 128/23 133/1 134/19 137/25 | | |
| period [6] | 17/3 32/1 87/1 88/4 166/2 193/2 | | |
| periodically [1] | 32/6 | | |
| periods [1] | 74/5 | | |
| permit [2] | 200/20 201/11 | | |
| permitted [3] | 46/12 145/24 204/9 | | |
| Persian [6] | 95/8 95/10 95/13 95/17 121/1 121/6 | | |
| persist [1] | 23/19 | | |
| persisted [1] | 47/3 | | |
| person [3] | 118/10 119/13 126/12 | | |
| person's [1] | 213/19 | | |
| personal [4] | 96/4 102/13 104/21 156/16 | | |
| personnel [3] | 47/24 57/10 97/8 | | |
| perspective [14] | 113/11 114/13 118/24 124/6 124/10 124/18 125/4 125/9 125/19 125/21 125/22 143/14 150/15 211/13 | | |
| perspectives [4] | 18/12 115/2 118/20 218/8 | | |
| pertains [2] | 221/20 222/25 | | |
| Peruvian [1] | 91/18 | | |
| PGS [1] | 60/1 | | |
| Ph.D [1] | 2/10 | | |
| pharmaceuticals [1] | 140/21 | | |
| phase [2] | 76/7 76/8 | | |
| PhD [3] | 42/3 135/15 214/19 | | |
| phenomenon [1] | 16/22 | | |
| phrase [2] | 180/6 199/11 | | |
| physical [1] | 221/4 | | |
| physically [1] | 120/12 | | |
| pick [1] | 176/8 | | |
| picked [2] | 120/16 163/23 | | |
| picture [1] | 211/10 | | |
| pictures [1] | 117/21 | | |
| piece [5] | 19/4 110/19 158/16 159/10 193/23 | | |
| pieces [2] | 4/5 148/23 | | |
| pilot [1] | 119/12 | | |
| pin [6] | 93/3 93/4 95/19 96/7 96/12 97/11 | | |
| pipeline [1] | 126/10 | | |
| place [4] | 11/10 65/20 126/7 195/24 | | |
| places [2] | 104/7 119/10 | | |
| plaintiff [4] | 1/4 1/12 143/16 229/2 | | |

| | | | |
|---|--|--|--|
| <p>plaintiff [1] 121/2 2/3 146/4 510/15 510/16 61/11 63/6 214/13 215/2 216/4 221/7 222/13 225/7</p> <p>plaintiffs [3] 187/19 223/21 229/5</p> <p>planet [1] 75/11</p> <p>plans [5] 94/17 100/6 100/17 100/20 164/7</p> <p>platform [2] 93/7 100/10</p> <p>platforms [1] 94/9</p> <p>play [5] 91/3 91/6 107/12 110/9 110/17</p> <p>played [1] 123/13</p> <p>player [2] 113/18 114/3</p> <p>players [3] 110/10 113/19 114/9</p> <p>playing [2] 110/14 110/18</p> <p>pleasantly [1] 114/6</p> <p>please [15] 3/3 3/8 89/16 106/17 107/22 133/8 133/10 133/12 150/12 179/23 192/11 195/25 196/2 204/2 224/5</p> <p>plus [2] 92/10 200/15</p> <p>podium [1] 52/7</p> <p>point [40] 11/3 33/14 43/16 57/7 58/17 71/8 88/17 96/7 109/17 109/25 114/4 122/11 122/19 125/18 128/8 130/6 130/16 131/23 131/25 132/4 153/2 158/23 161/9 171/3 179/20 179/21 180/2 183/22 184/12 193/18 193/24 195/7 196/9 196/16 200/3 200/22 203/22 230/11 231/23 232/1</p> <p>pointed [1] 220/5</p> <p>points [8] 56/19 57/20 58/3 58/20 59/12 59/15 88/7 88/9</p> <p>poison [1] 22/5</p> <p>police [3] 37/17 37/18 37/25</p> <p>police-civilian [1] 37/17</p> <p>policies [4] 80/17 81/3 81/14 212/22</p> <p>policing [5] 37/12 37/13 37/15 37/24 39/8</p> <p>policy [2] 17/4 94/18</p> <p>political [16] 4/10 4/11 10/15 11/19 15/25 32/2 32/5 32/9 32/17 43/9 76/9 81/22 82/16 83/25 160/16 185/12</p> <p>politically [3] 32/17 32/20 46/22</p> <p>pool [1] 218/25</p> <p>poor [4] 112/11 112/11 112/11 167/8</p> <p>poorly [2] 8/17 69/1</p> <p>popular [1] 137/24</p> <p>popularized [1] 138/2</p> <p>population [10] 13/21 31/17 32/19 38/3 38/25 49/2 66/25 70/5 70/21 119/14</p> <p>populations [8] 13/23 17/5 37/1 37/20 38/21 48/25 49/4 73/8</p> <p>port [1] 120/3</p> <p>portfolios [1] 207/20</p> <p>portion [5] 69/1 70/23 106/15 154/11 222/24</p> <p>portraits [1] 222/18</p> <p>position [12] 20/24 26/15 90/7 90/16 91/14 96/18 96/24 101/3 103/2 117/4 123/16 193/5</p> <p>positioned [1] 100/8</p> <p>positive [4] 36/2 66/11 114/10 164/19</p> <p>positively [2] 66/24 164/22</p> <p>possibility [2] 117/24 177/10</p> <p>possible [25] 17/18 26/6 30/19 50/2 74/9 104/17 107/15 107/16 109/23 117/22 118/3 125/8 125/10 125/11 154/1 163/24 186/14 186/19 205/8 212/20 220/6 221/2 225/24 226/2 226/3</p> <p>possibly [5] 43/25 44/5 74/12 161/17 225/22</p> <p>post [3] 94/2 94/10 95/3</p> <p>Postgraduate [3] 53/12 53/15 92/3</p> <p>posture [1] 105/12</p> <p>potential [7] 24/13 43/20 63/1 109/24 116/4 187/1 212/17</p> <p>potentially [4] 35/6 43/21 64/15 117/23</p> <p>poverty [1] 164/14</p> <p>power [20] 13/15 32/3 32/5 32/9 32/17 79/25 80/6 81/17 82/5 82/7 82/16 82/18 83/25 84/1 87/18 87/19 87/22 87/23 101/16 166/1</p> <p>powerful [2] 119/20 122/16</p> <p>powerhouse [1] 13/11</p> <p>powerless [1] 32/18</p> <p>PowerPoint [1] 102/15</p> <p>practice [2] 138/15 177/3</p> <p>precise [1] 187/3</p> <p>predecessor [2] 139/16 139/21</p> <p>predicated [1] 175/15</p> <p>predict [3] 182/24 207/13 207/18</p> | <p>prediction [1] 182/6</p> <p>predictions [3] 150/9 158/19 177/22</p> <p>predicted [2] 158/12 163/17</p> <p>predicts [1] 136/22</p> <p>predominantly [1] 46/21</p> <p>prefer [1] 129/18</p> <p>preference [1] 146/21</p> <p>preferences [14] 42/12 85/8 85/13 85/17 85/21 86/1 157/23 158/1 182/25 183/16 185/17 185/18 210/14 211/2</p> <p>preferred [2] 50/6 167/2</p> <p>preliminary [2] 151/22 183/22</p> <p>premise [1] 81/2</p> <p>premised [1] 79/21</p> <p>premium [1] 174/19</p> <p>prepare [1] 146/5</p> <p>prepared [2] 105/21 146/16</p> <p>preparing [2] 147/6 217/3</p> <p>presence [5] 61/20 66/15 101/17 103/10 204/6</p> <p>present [5] 1/21 24/15 27/5 51/2 224/20</p> <p>presentation [5] 145/10 151/2 183/11 184/17 230/2</p> <p>presented [7] 11/11 22/2 145/6 182/4 182/10 186/1 196/16</p> <p>presenting [2] 222/6 224/13</p> <p>presents [2] 21/15 220/25</p> <p>president [5] 32/11 84/3 84/8 84/8 94/24</p> <p>president-elect [1] 84/8</p> <p>Presidential [1] 91/10</p> <p>pretrial [1] 197/18</p> <p>pretty [7] 80/3 97/16 109/2 113/15 122/16 123/18 125/14</p> <p>previous [4] 128/1 141/10 141/13 143/14</p> <p>previously [2] 67/20 129/20</p> <p>pride [1] 23/11</p> <p>primary [6] 98/4 136/4 140/1 140/5 143/3 144/21</p> <p>principal [2] 90/13 116/4</p> <p>principles [1] 145/12</p> <p>prior [19] 23/18 24/4 25/21 70/20 141/21 142/15 143/5 143/7 143/20 154/6 173/16 173/19 174/22 175/8 176/15 177/13 181/21 217/10 219/9</p> <p>priorities [3] 103/6 103/8 104/9</p> <p>priority [2] 103/15 175/5</p> <p>private [1] 141/8</p> <p>privileged [1] 23/5</p> <p>prize [2] 214/4 220/5</p> <p>probabilities [1] 136/23</p> <p>probability [6] 9/9 9/12 9/13 9/14 9/20 152/24</p> <p>probably [19] 26/25 52/23 73/18 73/18 74/11 80/9 83/20 97/14 110/7 110/12 113/22 130/15 138/4 163/11 191/17 204/5 225/13 230/14 230/15</p> <p>probably 18 [1] 80/9</p> <p>problem [10] 17/22 18/7 38/23 39/12 40/6 114/23 155/22 169/4 169/6 172/4</p> <p>problem-solving [5] 17/22 18/7 38/23 39/12 40/6</p> <p>problematic [2] 19/24 183/10</p> <p>problems [7] 18/10 115/1 115/4 115/7 116/12 116/13 140/4</p> <p>procedures [1] 11/10</p> <p>proceed [3] 89/21 133/17 189/7</p> <p>proceeding [1] 143/21</p> <p>proceedings [1] 233/8</p> <p>process [42] 42/23 85/5 93/7 142/1 142/3 149/22 150/19 150/23 151/21 153/13 156/11 165/4 168/21 169/17 172/8 172/13 172/18 173/6 174/7 177/4 206/1 208/4 208/21 209/20 209/25 210/3 213/13 214/23 214/24 216/6 216/23 217/1 218/14 218/15 220/10 220/21 220/23 226/18 226/19 227/2 227/14 227/21</p> <p>produce [1] 194/18</p> <p>produced [2] 142/7 164/2</p> <p>produces [2] 50/3 126/14</p> <p>product [1] 129/23</p> <p>professional [11] 98/1 104/22 110/8 110/8 110/15 113/4 113/22 139/14 144/15 144/22 144/24</p> <p>professionalism [3] 110/20 113/1 114/25</p> <p>Professor [141] 3/16 9/3 24/6 26/18 29/21 30/13 40/12 68/8 86/19 145/6 145/9 147/10 147/12 147/15 148/3 148/7 148/15 148/17 149/4 149/23 150/4 150/6 150/13 151/3 151/4 151/11 151/22 152/14 153/7 153/11 153/22 153/24 154/9 154/11 154/18</p> | <p>155/7 155/12 155/15 155/18 156/1 156/6 156/10 157/1 157/7 157/14 157/20 158/2 158/12 158/12 158/17 159/1 159/18 160/2 160/15 160/16 160/25 162/3 162/7 162/10 162/25 163/4 163/21 164/8 165/6 165/20 165/22 166/4 166/14 166/18 167/4 167/8 167/19 168/3 168/6 168/12 168/13 168/23 169/7 169/16 170/11 170/19 170/23 171/16 171/20 172/3 172/10 172/23 173/9 174/8 174/11 174/24 175/9 175/22 175/25 177/18 177/23 178/1 178/21 179/7 179/11 180/1 180/21 181/11 182/4 182/10 182/19 183/4 183/15 184/15 184/17 185/7 185/9 186/1 186/7 186/18 205/21 207/7 207/12 207/24 208/7 208/11 209/19 211/5 211/14 212/4 212/11 212/15 213/7 213/12 214/22 215/7 216/16 217/19 220/9 220/14 225/10 227/6 227/9 227/10 227/23</p> <p>professors [1] 12/12</p> <p>proficiency [2] 17/1 17/12</p> <p>profile [2] 12/5 46/24</p> <p>programs [1] 46/23</p> <p>progress [3] 129/13 129/14 129/16</p> <p>progresses [1] 172/8</p> <p>prohibition [1] 209/15</p> <p>Project [21] 3/17 5/22 9/5 11/4 11/11 19/16 21/17 30/13 30/22 34/6 40/1 70/24 71/12 75/23 76/3 76/12 76/25 77/4 77/12 78/2 80/17</p> <p>projection [1] 101/17</p> <p>proliferation [1] 101/19</p> <p>promise [1] 17/8</p> <p>promote [1] 106/19</p> <p>promoting [1] 104/18</p> <p>promotion [1] 44/3</p> <p>pronouncing [2] 61/9 133/7</p> <p>properly [3] 100/20 167/5 167/16</p> <p>property [1] 204/21</p> <p>proposed [1] 178/21</p> <p>proposing [1] 81/12</p> <p>propulsion [2] 93/17 100/23</p> <p>prospect [3] 43/1 43/5 43/6</p> <p>prospects [2] 171/11 181/25</p> <p>protecting [1] 119/19</p> <p>protection [1] 94/20</p> <p>protocol [12] 194/15 194/18 195/8 196/20 196/22 196/22 197/7 197/16 197/20 197/24 198/12 198/18</p> <p>protocols [6] 195/4 195/15 195/16 196/11 196/12 198/8</p> <p>proud [1] 119/17</p> <p>prove [1] 162/7</p> <p>proven [1] 118/6</p> <p>provide [9] 13/4 98/16 101/16 103/23 103/25 141/16 161/7 163/20 176/20</p> <p>provided [3] 11/1 87/2 205/21</p> <p>provides [2] 151/12 160/10</p> <p>public [4] 18/18 100/23 141/9 142/7</p> <p>publication [5] 25/8 76/2 139/11 206/17 206/23</p> <p>publications [6] 25/6 34/7 205/4 206/3 206/20 206/25</p> <p>publish [1] 139/8</p> <p>published [8] 11/14 11/17 11/21 160/16 185/8 185/11 220/9 225/19</p> <p>Puerto [1] 74/15</p> <p>pull [10] 27/23 33/3 44/11 46/5 71/12 104/11 104/12 106/12 108/5 134/19</p> <p>purchasing [1] 166/1</p> <p>purely [1] 76/12</p> <p>purpose [1] 119/18</p> <p>purposes [8] 27/24 31/3 74/22 134/16 184/2 214/14 215/2 225/7</p> <p>pursuant [1] 233/6</p> <p>pursue [3] 91/3 135/12 184/6</p> <p>pursued [1] 136/11</p> <p>push [1] 35/22</p> <p>pushback [2] 12/6 12/9</p> <p>PUSTERLA [8] 1/23 44/13 47/22 54/17 55/22 56/15 80/2 80/8</p> <p>put [24] 5/10 11/10 19/12 21/13 33/11 33/13 43/23 56/24 67/6 99/15 102/17 122/11 132/12 143/16 146/3 155/20 174/19 184/18 191/2 191/12 198/1 205/16 222/17 222/23</p> <p>puts [1] 75/5</p> <p>Putting [1] 208/11</p> | |
| | | Q | |
| | | qualification [3] 93/7 99/19 185/10 | |

| | | |
|----------|---|--|
| Q | 166/2 181/24 192/4 194/21 195/17 196/14 199/3 199/9 199/14 199/21 201/3 201/4 rather [1] 11/24 12/24 12/25 12/25 12/25 152/10 181/13 193/11 195/5 rather [6] 62/7 66/24 78/23 140/9 171/24 213/24 ratings [1] 82/7 ratio [12] 6/5 7/2 7/3 7/7 7/9 7/23 9/10 9/25 10/2 13/6 14/20 16/18 raw [2] 19/17 19/18 RDB [1] 1/5 reach [1] 159/17 reaching [2] 21/18 28/7 react [2] 187/1 187/7 reaction [2] 186/16 210/25 read [18] 25/16 26/13 36/6 48/7 65/25 103/20 104/14 105/20 106/15 117/3 167/7 187/15 206/15 208/13 212/11 217/4 217/6 218/20 readily [1] 115/6 readiness [8] 27/14 28/18 90/14 99/25 102/2 103/11 108/16 116/1 reading [3] 47/16 47/18 48/7 ready [2] 104/2 133/6 real [6] 13/4 119/16 119/16 140/4 160/6 162/5 real-world [2] 13/4 140/4 realistic [5] 34/20 182/6 185/22 211/22 230/12 reality [6] 131/2 131/7 131/16 139/5 139/7 169/17 really [25] 7/18 7/18 10/7 15/1 18/19 69/3 100/9 102/14 112/16 112/23 113/25 114/24 115/3 115/9 116/14 119/23 122/11 129/23 132/21 156/13 185/21 200/3 212/20 212/23 222/9 realm [1] 37/24 Realtime [1] 233/5 reason [12] 4/22 4/24 22/16 69/24 130/9 134/10 137/25 138/4 168/16 185/3 201/25 210/13 reasonable [8] 81/25 88/4 115/22 163/10 215/17 215/18 215/20 215/21 reasonably [1] 231/13 reasons [12] 16/15 39/24 108/14 113/18 118/17 132/21 133/3 184/5 187/2 207/17 215/13 228/13 rebuttal [1] 12/17 recalculating [1] 79/13 recall [7] 80/5 180/8 218/19 219/15 220/4 220/8 228/24 receive [3] 91/8 134/8 135/13 received [9] 11/18 12/2 12/6 91/9 91/10 135/5 200/16 201/5 201/7 receiving [1] 204/10 recent [8] 32/12 35/1 35/16 37/24 53/24 79/25 82/13 83/11 recently [2] 120/10 185/8 recess [7] 88/23 89/2 89/4 89/5 132/18 189/2 189/3 reciprocate [1] 61/23 recognize [1] 146/7 recollection [3] 71/10 127/23 202/17 recommendation [3] 156/16 156/18 156/20 reconcile [1] 10/24 record [12] 3/8 25/16 52/13 72/16 89/17 101/1 131/12 133/13 159/13 160/9 163/15 178/18 recorded [2] 7/19 14/16 records [2] 8/9 15/2 recross [2] 88/17 228/3 recruit [3] 45/10 106/19 117/8 recruited [1] 91/3 recruiting [5] 104/18 108/16 116/20 116/23 116/25 recruitment [2] 51/18 116/17 red [1] 10/22 Redirect [4] 2/12 86/16 226/10 226/11 reduces [1] 109/10 reducing [1] 58/19 reenlistment [1] 57/9 reenlists [1] 56/2 refer [6] 19/9 45/7 80/14 83/8 174/4 198/20 referees [2] 206/9 206/22 reference [4] 47/23 53/6 55/10 60/10 referenced [4] 26/19 31/22 163/16 180/6 references [1] 201/2 referred [3] 27/10 39/3 88/12 referring [14] 18/19 25/1 44/10 50/19 | 54/22 55/6 80/12 83/9 83/14 83/15 163/10 185/14 197/1 224/23 reflect [1] 45/6 25/25 55/3 57/6 217/14 reflect [1] 130/11 reflected [12] 130/21 152/25 157/4 158/13 160/5 165/1 166/10 170/14 170/16 171/19 176/24 188/12 reflects [2] 155/15 171/20 refresh [2] 71/10 73/6 regard [1] 137/20 regarding [3] 169/1 170/17 187/11 regardless [1] 176/12 region [3] 64/22 94/13 97/12 register [1] 69/12 Registered [1] 233/4 regression [3] 9/5 10/10 168/24 regressions [2] 20/11 34/9 regular [5] 118/6 216/8 216/19 216/21 216/24 regulation [1] 140/16 regulations [1] 233/10 rehatting [1] 66/17 reinforce [1] 22/17 reinforced [2] 12/24 22/23 reject [1] 206/8 rejection [1] 137/5 relatability [5] 117/1 117/12 118/22 119/13 119/21 relatable [1] 119/17 relate [4] 117/5 117/5 117/6 147/13 related [6] 127/1 136/2 136/3 142/13 169/13 173/14 relates [6] 149/18 151/2 151/19 173/20 175/22 179/25 relating [1] 204/16 relation [3] 104/1 154/23 204/20 Relations [10] 32/3 79/25 80/7 81/18 82/6 82/8 87/18 87/19 87/22 87/23 relationship [7] 3/19 6/16 10/10 11/6 13/1 34/13 168/2 relationships [1] 34/1 relative [5] 60/17 61/25 62/14 78/20 138/1 relatively [11] 56/21 62/23 75/14 137/22 137/25 150/17 150/23 154/7 160/22 181/25 188/1 released [1] 83/21 relevance [1] 28/8 relevant [19] 24/7 26/25 34/23 34/24 36/17 39/7 39/20 40/2 136/7 138/11 142/15 147/17 156/11 156/23 158/3 169/3 169/10 181/7 181/9 reliability [2] 10/17 166/15 reliable [2] 162/9 162/24 reliably [2] 165/20 175/18 reliant [1] 156/7 relied [7] 44/6 45/17 45/19 142/6 160/15 167/9 224/18 relies [3] 147/16 160/25 161/2 religious [1] 68/4 rely [5] 21/17 28/7 81/25 87/21 169/25 relying [1] 83/2 remain [2] 20/13 47/24 remaining [3] 176/10 176/17 228/23 remains [1] 184/24 remember [28] 15/10 47/18 48/7 48/17 52/9 55/20 59/20 59/23 71/8 73/5 91/12 97/15 144/4 183/23 205/3 205/6 205/12 205/16 205/18 207/15 208/1 212/1 212/3 215/17 215/25 219/10 223/5 223/14 remind [6] 21/14 147/10 151/17 152/20 169/12 175/20 reminder [2] 179/6 225/16 remnants [1] 66/16 remote [2] 43/2 43/6 removal [1] 211/3 remove [3] 88/9 183/16 185/17 removing [1] 88/13 repeat [2] 190/22 212/3 repeatedly [2] 23/7 194/10 repeating [1] 118/25 repertoire [1] 18/8 replicated [1] 152/5 reply [1] 174/12 report [84] 5/11 9/1 17/25 21/25 22/2 24/22 25/10 26/7 27/1 27/3 28/10 36/12 37/12 42/17 44/11 45/17 47/ |
|----------|---|--|

| R | revenue [1] | review [21] | Russian [1] |
|--|--|--|--|
| report... [52] | 193/12 | 11/16 12/12 14/8 117/16 | 35/17 |
| 57/13 58/6 58/13 58/22 59/1 59/25 60/1 | review [22] | 145/5 206/1 206/2 206/4 206/10 | Russians [1] |
| 63/3 67/19 79/18 85/9 85/14 87/21 103/2 | 205/9 206/1 206/2 206/4 206/10 | 206/12 206/21 206/22 215/14 215/22 | S |
| 103/3 146/5 146/8 157/21 164/4 167/7 | 219/12 | | |
| 174/11 174/12 183/15 190/11 191/12 | reviewed [14] | 12/3 126/18 126/21 205/4 | S-T-U-A-R-T [1] |
| 191/24 192/7 192/23 214/6 214/10 214/18 | 205/5 205/20 206/3 214/10 217/3 219/16 | 219/23 220/10 225/8 225/19 | sad [1] |
| 215/15 215/23 216/5 217/3 217/4 217/6 | reviewing [1] | 141/9 | safe [6] |
| 217/20 218/20 219/12 219/16 219/23 | reviews [1] | 12/2 | 230/11 |
| 219/24 220/3 220/6 222/20 225/5 225/8 | reward [1] | 104/5 | safely [2] |
| reported [10] | ribbons [1] | 95/19 | safest [3] |
| 58/25 167/1 168/6 179/21 212/15 233/8 | Ricans [1] | 74/15 | safety [1] |
| REPORTER [4] | RICHARD [1] | 1/9 | Saharan [3] |
| reporting [4] | richness [1] | 158/20 | said [56] |
| reports [8] | rid [1] | 212/9 | 64/10 64/22 64/23 65/2 83/10 96/16 102/4 |
| 158/22 174/9 180/2 181/12 | right [177] | 3/5 8/1 9/12 9/15 21/24 | 113/16 123/25 124/8 124/9 128/3 131/8 |
| represent [7] | 31/18 33/14 41/1 41/13 42/7 44/9 44/22 | 45/17 46/4 46/14 46/18 46/25 47/4 47/7 | 143/3 152/14 156/22 159/15 160/8 175/14 |
| 150/16 178/19 188/3 | 47/12 48/9 48/13 48/19 48/22 50/8 52/11 | 53/4 54/13 55/1 55/15 56/7 56/10 56/13 | 178/16 185/14 186/21 190/17 192/18 |
| representation [7] | 56/19 57/11 57/20 57/25 58/3 58/9 58/13 | 58/21 59/1 59/16 59/18 60/4 60/13 60/20 | 193/22 194/6 194/10 195/3 197/10 205/12 |
| 195/2 195/19 196/13 202/3 | 61/15 62/8 62/12 64/8 64/12 64/14 65/11 | 65/16 67/10 68/17 68/19 69/3 69/18 71/4 | 205/14 205/16 207/24 208/7 208/11 208/12 |
| representative [1] | 72/11 72/17 72/20 73/1 73/4 75/8 75/16 | 75/16 75/18 76/13 76/16 78/25 79/6 79/10 | 208/13 208/15 211/2 211/5 212/14 214/4 |
| represented [4] | 80/1 80/11 80/13 80/23 81/1 81/10 81/19 | 81/23 82/12 82/24 83/3 83/18 84/3 84/4 | 216/16 218/16 219/8 220/2 220/20 223/6 |
| representing [2] | 84/6 85/3 85/10 86/6 87/17 89/2 89/12 | 89/13 96/7 101/9 106/8 109/22 116/20 | 224/5 227/21 227/23 |
| represents [3] | 119/5 119/25 123/14 125/23 131/22 132/6 | 133/10 135/3 135/10 146/18 153/5 154/5 | sailor [3] |
| repressed [3] | 156/2 169/19 181/6 182/8 185/25 186/5 | 187/2 189/15 189/16 189/18 190/2 190/9 | 56/1 56/17 57/19 |
| represses [1] | 190/13 190/15 191/6 191/8 191/10 192/12 | 194/7 195/1 197/6 197/25 198/13 198/25 | sailors [7] |
| repressing [1] | 203/16 204/18 207/15 207/21 208/6 208/12 | 208/18 208/23 209/5 209/20 209/25 210/8 | 27/3 28/3 31/11 54/3 56/18 |
| repression [8] | 211/4 212/10 213/1 213/22 214/15 214/17 | 214/20 215/16 215/19 216/21 216/25 | 120/4 121/23 |
| 24/4 35/14 69/8 81/9 | 217/17 217/18 217/20 219/14 221/5 221/8 | 222/2 222/22 223/4 223/22 225/22 225/24 | salaries [2] |
| republic [1] | 226/3 226/6 228/5 228/19 | rights [7] | 166/6 166/7 |
| reputation [2] | rights [7] | 4/11 36/1 36/3 68/22 70/13 | salary [1] |
| require [2] | 81/22 82/8 | rigidity [1] | 166/5 |
| required [1] | rigorous [1] | 227/21 | salvaged [1] |
| requirement [3] | riots [2] | 160/1 | 13/12 |
| requirements [4] | rise [4] | 89/3 132/16 189/1 232/9 | same [46] |
| requires [2] | rises [1] | 10/4 | 13/23 22/9 22/9 30/4 31/1 54/4 |
| rerun [1] | risk [7] | 22/9 35/9 37/2 40/5 109/10 | 55/4 57/6 57/18 58/11 59/8 59/14 75/20 |
| research [12] | risks [4] | 21/15 22/1 24/6 61/21 | 80/24 85/18 87/10 110/14 110/19 112/17 |
| 21/17 37/15 44/6 44/10 50/1 139/12 140/7 | RMR [2] | 1/25 233/16 | 115/20 118/17 118/23 121/1 124/6 124/10 |
| 140/8 | ROBINSON [9] | 1/19 2/6 3/12 3/15 40/14 | 124/18 125/4 125/9 125/18 125/21 125/22 |
| researchers [2] | 42/25 86/7 88/16 203/24 | robust [2] | 125/23 141/20 152/6 152/11 162/18 169/6 |
| resemblance [1] | robustness [4] | 10/18 11/7 163/2 179/1 | 169/9 173/7 173/21 176/10 179/18 179/22 |
| resentment [1] | rocket [1] | 203/13 | 202/5 207/5 222/20 |
| reserve [3] | Rodriguez [2] | 53/10 53/22 | same-minority [4] |
| reservist [1] | role [4] | 101/6 142/12 143/1 162/18 | 54/4 55/4 58/11 59/14 |
| residential [1] | roles [1] | 94/21 | sample [1] |
| resiliency [1] | rolling [1] | 171/10 | 81/15 |
| resources [1] | Roman [1] | 17/1 | San [1] |
| respect [22] | Romans [1] | 17/9 | 94/16 |
| 113/1 116/8 116/11 130/17 193/6 194/2 | Ronda [4] | 1/25 232/4 233/4 233/16 | sanctioned [1] |
| 194/17 195/4 195/5 195/6 196/17 200/1 | root [1] | 38/25 | 79/1 |
| 200/15 201/13 203/12 218/23 219/5 228/12 | Rosen [5] | 45/2 45/5 45/5 50/24 51/7 | SAT [7] |
| respectful [2] | Ross [1] | 190/2 | 161/10 161/13 161/18 161/21 |
| 113/4 122/24 | rosters [2] | 15/4 73/24 | 161/25 163/10 163/12 |
| Respectfully [1] | ROT [1] | 126/14 | Satisfaction [1] |
| respectively [1] | ROTC [2] | 117/16 126/2 | 29/3 |
| respond [2] | roughly [3] | 8/18 32/21 152/8 | satisfactory [2] |
| 12/20 176/19 | roundtable [2] | 11/19 11/20 | 201/15 201/16 |
| respondents [4] | row [2] | 29/3 29/12 | satisfied [4] |
| 64/17 65/5 65/9 66/8 | rows [1] | 73/14 | 29/6 29/12 173/22 231/15 |
| responding [1] | Roya [1] | 35/16 | saw [10] |
| 222/13 | rule [6] | 13/18 13/19 193/14 193/16 | 31/10 53/17 112/24 113/1 123/23 |
| response [3] | 196/17 208/23 | ruler [1] | 124/1 220/20 221/7 222/17 222/23 |
| 12/10 197/8 223/8 | rules [6] | 121/24 176/5 177/3 177/13 | say [66] |
| responsibility [1] | 193/9 196/3 | run [7] | 12/9 17/18 18/16 23/21 23/22 |
| 97/13 | running [1] | 9/19 | 26/13 28/19 30/4 31/4 55/17 65/4 68/17 |
| responsible [7] | rural [1] | 130/8 | 70/2 74/15 74/17 75/14 81/13 83/1 87/7 |
| 107/7 107/10 107/11 | rush [1] | 86/12 | 98/12 102/15 107/22 109/6 112/1 113/6 |
| 109/10 141/25 142/2 142/4 | Russia [1] | 39/10 | 114/6 114/13 115/15 115/21 115/23 116/3 |
| rest [1] | | | 116/5 117/22 118/11 121/15 121/24 122/7 |
| 231/4 | | | 124/19 125/2 125/5 125/18 127/5 127/21 |
| restate [2] | | | 131/4 137/13 142/11 143/25 144/20 144/22 |
| 15/20 68/11 | | | 145/15 148/9 163/11 168/10 170/1 178/14 |
| restating [1] | | | 184/14 196/3 196/21 202/21 208/3 210/2 |
| 3/7 | | | 220/3 220/13 222/5 223/3 230/11 |
| resting [2] | | | saying [14] |
| 229/20 229/23 | | | 51/14 96/3 121/10 121/19 |
| restricted [1] | | | 124/13 124/15 124/24 129/15 131/1 168/17 |
| 92/20 | | | 193/7 194/5 210/10 211/8 |
| restrictions [1] | | | says [27] |
| 225/25 | | | 8/1 25/16 26/15 42/21 56/17 |
| result [4] | | | 56/20 58/22 58/23 58/24 59/1 62/20 66/1 |
| 151/3 177/17 209/19 223/16 | | | 103/5 105/16 119/21 120/5 122/12 159/7 |
| resulted [2] | | | 160/19 161/3 163/1 179/3 199/21 201/2 |
| 28/2 44/1 | | | 202/9 218/4 219/24 |
| results [22] | | | scale [10] |
| 9/4 10/18 11/11 29/5 51/3 | | | 5/4 5/6 6/21 8/6 11/3 24/2 |
| 53/22 53/24 58/17 142/22 143/13 145/9 | | | 24/17 30/8 33/13 69/13 |
| 145/11 149/11 149/23 150/14 152/6 163/21 | | | scenarios [1] |
| 168/11 169/25 182/24 183/11 185/12 | | | 112/4 |
| reswear [1] | | | schedule [2] |
| 3/3 | | | 123/20 231/17 |
| retain [3] | | | scheduling [4] |
| 105/23 106/19 145/2 | | | 132/22 133/3 228/11 |
| retained [3] | | | 228/12 |
| 202/16 202/18 202/21 | | | Scholar [2] |
| 104/18 105/3 | | | 205/15 205/17 |
| retaliation [1] | | | scholarship [1] |
| 27/1 | | | 135/12 |
| retention [29] | | | school [17] |
| 28/18 30/4 51/18 54/2 | | | 39/3 53/12 53/15 90/23 92/3 |
| 54/5 54/11 54/14 54/25 55/6 55/15 55/23 | | | 117/22 119/8 130/10 131/13 135/9 135/11 |
| 56/17 56/18 56/21 57/16 57/20 58/2 58/8 | | | 136/10 138/16 138/25 161/22 162/1 163/11 |
| 58/12 58/16 58/19 58/20 59/5 59/11 59/11 | | | schools [1] |
| 59/15 108/16 118/15 119/2 | | | 185/17 |
| retired [2] | | | science [5] |
| 91/23 129/19 | | | 11/19 15/25 32/2 43/10 92/3 |
| retirement [1] | | | scientists [1] |
| 164/7 | | | 76/9 |
| retrieve [1] | | | scope [1] |
| 203/23 | | | 145/5 |
| return [1] | | | score [6] |
| 35/16 | | | 8/12 79/16 87/9 87/11 161/11 |
| returns [1] | | | 163/12 |
| 203/25 | | | scored [1] |
| reveal [1] | | | 75/14 |
| 50/8 | | | scores [8] |
| | | | 6/17 9/18 75/17 161/13 161/18 |
| | | | 161/21 161/25 163/10 |
| | | | Scott [1] |
| | | | 70/12 |
| | | | screen [23] |
| | | | 48/6 52/4 52/7 54/17 58/10 |
| | | | 102/17 146/3 146/18 189/20 189/21 192/22 |
| | | | 198/1 198/5 198/12 206/6 207/7 207/12 |

| | | |
|--|--|---|
| S | sequence [2] 136/11 137/8 | single-gender [1] 112/22 |
| screen... [5] 212/5 214/14 205/12 259/223/10 224/21 | sequentially [1] 176/13 | single-parent [1] 164/16 |
| script [1] 121/9 | series [1] 100/12 971/4 101/2 | sir [1] 89/10 89/12 |
| scrutinized [1] 145/9 | serious [1] 38/16 | 127/9 127/11 127/18 128/13 128/21 130/5 |
| scrutiny [1] 11/16 | Serna [2] 53/10 53/23 | 132/14 204/2 217/17 223/20 224/4 228/10 |
| sea [18] 93/19 93/22 93/23 96/6 96/7 96/11 96/12 96/16 98/8 98/14 98/18 100/21 100/22 100/23 100/24 101/2 101/17 122/1 | serve [3] 21/9 46/12 109/18 | sit [1] 200/11 |
| SEAL [1] 119/12 | served [6] 41/1 91/2 97/19 102/1 113/8 113/9 | sitting [1] 51/5 |
| search [1] 121/5 | serves [1] 119/4 | situation [6] 30/24 83/14 93/8 111/23 129/16 131/10 |
| seat [1] 89/15 | service [17] 17/9 28/4 69/15 85/10 91/1 92/9 92/12 94/14 95/21 95/25 96/1 101/1 127/5 127/10 127/10 129/23 132/7 | situations [2] 95/16 114/20 |
| seated [2] 89/6 132/20 | services [5] 84/17 98/7 99/22 104/7 205/1 | six [4] 144/4 144/21 151/16 190/17 |
| second [22] 15/11 21/12 21/14 21/15 22/16 56/1 57/21 57/22 58/15 60/11 61/18 84/25 85/2 93/14 96/16 134/24 149/15 149/16 169/11 169/12 207/11 214/17 | set [14] 12/7 21/1 21/2 32/3 81/12 147/20 156/9 156/15 161/15 166/15 183/3 187/8 211/13 218/6 | size [13] 20/2 20/12 54/13 57/3 57/10 87/13 148/2 171/13 171/17 182/18 183/1 183/2 211/23 |
| second-class [1] 15/11 | sets [1] 174/19 | skilled [1] 47/24 |
| Secretariat [13] 133/25 134/1 134/2 134/3 135/8 139/16 139/20 191/8 191/19 193/6 194/2 200/5 200/18 | setting [1] 138/23 | skills [5] 17/8 48/16 49/7 118/9 217/24 |
| secretary [15] 84/6 84/16 93/18 94/5 97/21 102/25 103/3 103/8 105/11 105/14 107/3 107/4 107/6 118/12 190/2 | settlement [1] 204/17 | skin [2] 49/11 49/17 |
| secretary's [2] 104/15 117/3 | seven [4] 41/22 41/23 181/4 181/9 | Sky [1] 13/25 |
| sectarian [1] 37/25 | several [7] 30/21 30/25 95/8 121/2 140/23 204/14 207/24 | Sky-high [1] 13/25 |
| section [9] 46/9 46/10 47/6 55/14 105/20 106/12 106/16 157/21 157/22 | Seville [1] 134/7 | slate [6] 172/15 172/22 172/23 173/1 173/3 173/9 |
| sector [1] 140/21 | sexual [1] 66/21 | slates [8] 23/15 172/19 172/20 173/4 173/7 173/8 227/3 227/4 |
| sectors [2] 140/18 140/18 | share [17] 22/9 22/9 70/22 85/18 125/8 125/21 125/22 160/2 171/16 172/23 183/18 187/25 191/19 191/20 191/25 194/5 198/5 | slide [74] 20/18 21/24 113/23 147/25 155/11 155/24 157/4 157/17 157/17 158/12 158/12 158/13 159/11 160/5 160/13 162/6 162/22 163/16 163/19 164/17 164/25 165/1 165/13 166/9 166/10 166/11 167/3 167/15 169/11 169/19 170/10 170/14 170/16 170/22 171/6 171/15 171/19 172/14 173/11 174/13 174/24 175/2 175/19 175/24 177/1 177/21 178/14 178/19 179/16 180/17 181/8 182/2 182/9 183/4 183/19 184/13 185/4 186/18 187/9 187/17 211/24 212/2 212/3 216/3 217/8 218/16 219/7 222/9 222/11 222/23 223/10 224/1 224/21 224/25 |
| security [4] 38/7 92/4 106/25 121/10 | shares [8] 67/7 124/6 124/10 125/4 187/16 187/22 188/14 204/25 | Slide 1 [1] 147/25 |
| see [109] 3/19 6/4 6/5 6/16 6/23 7/7 7/12 7/15 7/18 8/1 8/13 8/15 9/22 9/25 10/1 10/3 10/10 10/23 11/6 11/6 11/7 12/15 19/18 21/6 22/19 24/1 24/19 28/22 28/23 30/1 31/10 34/2 39/15 39/18 40/4 40/23 40/24 43/16 44/13 44/21 44/21 45/13 47/15 47/16 48/3 48/6 52/7 52/12 52/18 53/6 53/8 53/20 53/22 56/1 57/24 58/5 58/8 60/9 61/15 62/19 63/9 63/15 64/20 71/17 73/16 74/2 96/2 103/5 103/13 105/16 106/21 108/3 108/25 109/4 112/13 117/4 117/19 118/8 120/5 125/25 132/13 134/19 152/1 154/4 167/23 181/22 184/12 186/14 189/17 189/24 197/20 198/12 198/15 198/19 201/14 214/14 215/9 215/12 216/5 216/10 217/12 217/25 218/9 219/2 219/21 220/18 221/11 224/20 230/17 | sharing [1] 193/12 | Slide 19 [1] 162/6 |
| seeing [7] 8/19 9/16 13/1 14/8 39/9 88/11 118/2 | she [3] 84/14 118/2 118/3 | Slide 28 [1] 169/11 |
| seek [3] 107/25 115/3 165/4 | she's [2] 118/6 118/6 | Slide 29 [1] 169/19 |
| seeking [1] 164/23 | shed [1] 12/20 | Slide 30 [3] 170/10 170/14 170/16 |
| seeks [7] 107/21 107/24 217/14 218/5 218/22 219/4 219/18 | sheet [2] 71/11 71/12 | Slide 31 [1] 170/22 |
| seemed [1] 88/4 | Shia [1] 38/1 | Slide 32 [1] 171/6 |
| seems [4] 65/8 200/9 216/14 230/19 | shift [4] 29/18 29/20 30/6 30/10 | Slide 33 [2] 171/15 171/19 |
| seen [18] 4/25 14/19 15/11 23/7 32/19 35/24 37/22 37/23 75/11 87/25 102/22 105/8 111/18 123/25 176/22 217/20 219/16 225/13 | shifts [1] 29/25 | Slide 34 [1] 172/14 |
| segregation [1] 81/6 | ship [20] 93/12 93/14 96/13 99/19 100/8 100/22 102/1 110/23 111/2 111/11 111/21 113/12 113/15 113/17 114/11 114/12 115/11 115/17 115/19 115/24 | Slide 35 [2] 173/11 217/8 |
| seize [1] 115/3 | shipboard [6] 101/9 101/12 110/22 110/24 111/25 113/11 | Slide 36 [1] 174/13 |
| seizure [1] 121/5 | ships [25] 54/1 55/1 55/5 55/12 57/10 57/16 92/22 92/23 92/24 92/25 93/2 96/19 97/5 97/7 99/17 101/3 101/4 101/5 111/19 112/21 112/21 112/23 115/14 121/8 122/8 | Slide 37 [1] 174/24 |
| select [3] 92/12 177/5 177/20 | shock [1] 18/16 | Slide 38 [2] 175/2 219/7 |
| selection [5] 161/4 161/4 163/7 163/8 174/6 | short [3] 12/12 129/5 230/8 | Slide 40 [1] 175/24 |
| self [2] 44/7 177/20 | shot [1] 71/5 | Slide 41 [1] 177/1 |
| self-confirms [1] 44/7 | should [13] 10/9 23/22 45/10 49/23 52/3 66/11 83/1 100/14 117/1 130/24 130/25 196/21 228/6 | Slide 42 [2] 177/21 178/19 |
| self-select [1] 177/20 | shouldn't [3] 22/22 88/20 114/7 | Slide 44 [1] 180/17 |
| seminal [2] 51/8 51/13 | show [4] 29/5 61/24 62/24 212/2 | Slide 46 [1] 182/2 |
| Senate [1] 105/12 | showed [2] 114/6 224/21 | Slide 47 [1] 182/9 |
| send [2] 13/25 206/8 | showing [5] 65/25 189/20 212/4 222/1 225/9 | Slide 48 [1] 183/4 |
| Senegal [1] 64/8 | shows [2] 7/4 154/7 | Slide 50 [1] 183/19 |
| senior [18] 32/11 54/1 54/4 55/4 55/7 55/11 55/17 56/3 57/8 57/18 58/11 58/18 91/16 99/23 112/24 113/13 118/4 118/12 | side [17] 6/7 6/11 7/14 7/21 9/19 14/18 16/8 26/12 93/3 147/4 153/3 195/20 201/14 222/23 223/9 224/21 231/12 | Slide 51 [1] 184/13 |
| sense [18] 105/1 105/4 106/7 113/1 116/8 117/11 117/11 136/3 138/21 140/11 143/18 161/19 161/20 162/2 163/9 168/15 191/18 206/21 | sides [2] 36/20 147/2 | Slide 52 [1] 185/4 |
| sensitive [5] 26/23 29/24 111/16 111/16 150/9 | signed [1] 194/19 | Slide 55 [1] 187/17 |
| sentence [6] 57/21 57/22 58/4 58/15 61/18 65/25 | significance [3] 57/4 156/17 174/5 | slides [1] 146/15 |
| sentences [1] 104/14 | significant [15] 20/14 29/23 50/3 50/5 57/3 57/9 59/5 59/10 147/21 148/19 167/1 167/23 187/23 188/3 188/9 | slightly [1] 30/8 |
| separate [4] 46/13 72/12 119/20 178/11 | significantly [4] 31/12 46/25 101/18 183/16 | small [18] 19/20 19/21 28/22 56/21 57/1 70/23 87/14 127/24 128/9 150/17 150/23 154/7 154/7 181/25 187/25 188/1 188/2 188/3 |
| separated [1] 86/23 | signifies [3] 96/5 97/9 97/18 | smaller [8] 57/25 58/1 87/8 149/1 168/6 179/18 179/21 210/8 |
| separating [1] 28/3 | similar [19] 32/22 33/2 34/8 39/17 64/10 65/6 65/8 65/21 66/10 67/7 120/9 120/14 125/14 152/2 152/6 153/5 161/24 179/18 188/9 | smallest [1] 111/3 |
| September [3] 1/7 2/2 233/12 | SIMMONS [1] 1/24 | snapshot [3] 4/2 4/4 70/20 |
| | simple [7] 4/18 5/2 112/15 137/2 143/19 199/6 200/24 | snapshots [1] 32/7 |
| | simplicity [1] 138/1 | so [379] |
| | simply [8] 6/6 67/6 78/22 80/16 154/14 154/21 155/1 177/15 | so-called [1] 15/9 |
| | simulates [1] 181/11 | socially [1] 47/25 |
| | simulations [3] 182/5 207/13 207/18 | society [4] 68/23 70/14 78/16 130/2 |
| | simultaneously [2] 100/11 229/23 | socioeconomic [17] 156/20 161/16 163/14 163/23 164/19 165/7 165/10 165/21 166/16 167/5 167/17 168/7 168/11 210/14 211/2 211/7 211/10 |
| | since [12] 11/17 32/6 65/7 78/4 78/11 81/15 81/22 129/6 139/21 152/19 184/10 229/12 | socioeconomically [2] 164/10 165/15 |
| | single [9] 5/4 71/5 112/22 115/14 125/1 125/17 150/8 164/16 177/18 | socioeconomics [2] 161/18 211/8 |
| | | sociological [1] 74/1 |
| | | Soeters [1] 46/2 |
| | | software [1] 138/6 |
| | | soldier [2] 15/2 35/18 |
| | | soldiers [33] 6/7 6/14 6/25 7/14 7/20 9/10 9/15 14/2 14/5 14/8 14/17 15/4 16/7 23/13 23/15 23/16 23/25 24/19 27/2 28/3 31/11 35/12 35/13 35/20 35/22 35/24 35/25 37/7 39/13 49/5 70/7 70/12 73/24 |

| | | |
|---|---|---|
| S | sponsored [1] 69/7 | straightforward [1] 137/22 |
| solely [4] 27/2 125/12 148/5 200/5 | spring [1] 202/24 | strategic [4] 102/25 104/1 105/22 107/16 |
| solution [1] 20/9 | squad [1] 11/17 45/10 161/9 171/7 | strawbridge [1] 97/1 |
| solutions [1] 114/21 | 96/18 97/1 102/12 | STRAWBRIDGE [11] 1/13 2/6 40/15 86/6 |
| solve [1] 115/7 | Squadron 22 [1] 94/7 | 86/20 87/17 88/6 88/17 221/4 231/10 |
| solving [5] 17/22 18/7 38/23 39/12 40/6 | square [1] 97/16 | 231/19 |
| some [100] 4/11 4/14 7/17 8/9 12/5 12/6 | stability [5] 151/10 151/13 187/16 | strength [8] 103/24 149/11 153/10 154/8 |
| 12/7 12/19 12/25 14/11 15/16 16/3 18/21 | 187/22 188/14 | 158/19 173/3 174/21 208/9 |
| 19/25 22/5 23/14 24/6 24/14 24/21 25/6 | stack [1] 110/25 | strengthen [1] 23/12 |
| 31/12 34/10 37/3 38/1 38/1 38/2 38/16 | stacked [2] 34/17 35/1 | stressful [1] 112/9 |
| 39/15 41/8 43/24 59/20 60/8 60/10 60/10 | stacking [1] 34/17 | stretch [1] 113/5 |
| 64/6 64/10 66/20 67/20 77/19 79/8 83/24 | staff [14] 92/5 94/1 94/5 94/12 94/19 | strictly [2] 161/18 162/20 |
| 86/20 87/12 87/17 88/6 95/18 98/4 108/14 | 97/20 97/21 101/10 107/10 118/5 122/25 | strides [1] 24/10 |
| 111/18 113/15 117/1 121/4 122/3 122/9 | 195/7 195/21 231/16 | strike [13] 94/15 96/10 96/23 96/24 97/7 |
| 126/7 128/1 128/2 129/7 130/17 131/18 | stage [1] 206/8 | 101/8 141/13 192/6 192/15 200/9 200/20 |
| 134/10 136/12 140/11 140/15 140/18 | stages [1] 109/21 | 201/8 201/20 |
| 143/17 143/20 150/18 151/13 154/22 155/8 | stand [9] 14/5 88/21 89/12 121/20 197/17 | strong [5] 104/2 122/19 159/8 159/9 |
| 155/16 163/25 168/7 172/9 173/1 177/2 | 204/2 210/13 228/8 232/7 | 187/6 |
| 187/6 187/13 187/16 193/20 195/13 199/24 | standard [11] 49/25 81/21 82/5 87/22 | stronger [4] 160/20 160/22 160/22 161/14 |
| 207/17 209/2 209/23 209/24 216/7 216/8 | 88/1 138/14 171/25 172/2 172/5 172/7 | strongest [1] 104/17 |
| 216/20 221/4 226/24 227/6 227/10 227/21 | 205/10 | struggle [1] 13/16 |
| 227/23 227/23 227/24 228/11 228/15 | standards [5] 205/9 205/10 216/16 216/19 | Stuart [2] 2/10 133/14 |
| somebody [2] 49/15 118/18 | 216/25 | student [3] 1/21 117/22 217/21 |
| someone [13] 12/19 101/25 103/17 116/25 | stands [4] 89/2 132/15 132/16 202/9 | students [15] 1/3 41/19 41/20 41/25 42/3 |
| 116/25 117/5 117/6 117/7 118/19 118/22 | star [7] 90/7 91/20 96/25 96/25 117/20 | 119/9 123/10 131/12 167/12 207/19 214/1 |
| 118/24 160/20 203/23 | 117/23 119/10 | 214/19 217/23 222/24 223/24 |
| someone's [1] 113/10 | stars [2] 90/8 96/2 | studied [1] 137/10 |
| something [28] 11/22 12/1 16/23 32/21 | start [20] 43/16 61/18 88/24 98/6 121/16 | studies [34] 22/19 23/7 27/2 27/12 27/17 |
| 39/10 77/2 77/16 100/3 102/18 108/25 | 126/9 126/10 128/14 132/22 132/23 133/2 | 27/20 37/22 37/23 44/14 44/23 44/24 45/2 |
| 109/4 111/11 118/9 121/3 124/23 125/2 | 133/4 147/25 151/16 188/25 228/14 228/20 | 45/3 49/21 50/8 50/16 50/16 51/2 51/8 |
| 128/19 152/18 163/11 163/12 163/13 | 230/16 230/20 230/21 | 51/13 60/11 87/25 92/4 126/18 126/19 |
| 164/21 185/7 186/7 205/14 220/2 223/6 | started [4] 100/17 101/22 121/16 202/23 | 134/6 135/10 135/12 135/16 135/24 136/9 |
| 227/7 | starting [6] 25/11 37/17 81/24 158/23 | 136/13 138/10 164/2 |
| sometime [1] 202/21 | 179/20 228/19 | study [32] 25/14 27/16 27/25 35/16 37/24 |
| sometimes [4] 38/12 121/17 203/13 204/6 | state [23] 4/8 4/9 4/25 13/13 13/15 | 48/12 48/15 51/8 51/10 51/12 51/17 51/17 |
| somewhat [2] 44/12 72/4 | 22/24 23/21 32/6 35/15 48/2 65/6 67/5 | 53/9 53/12 53/14 53/18 54/12 54/16 54/22 |
| somewhere [5] 5/5 11/25 42/4 100/9 203/8 | 67/7 69/7 78/12 79/1 80/17 81/3 81/14 | 56/25 58/6 59/21 61/1 63/18 74/2 129/7 |
| soon [1] 86/10 | 89/16 98/25 99/11 133/12 | 135/17 135/18 137/6 160/24 161/2 185/12 |
| sophisticated [2] 158/25 159/16 | state-sanctioned [1] 79/1 | study's [1] 65/9 |
| sorry [37] 12/11 19/18 29/4 29/16 33/7 | state-sponsored [1] 69/7 | studying [1] 39/7 |
| 43/3 43/4 45/18 52/3 52/4 52/19 53/18 | stated [2] 183/15 206/12 | sub [3] 34/15 64/7 64/24 |
| 60/6 63/5 63/6 68/12 71/19 79/11 79/23 | statement [10] 15/24 104/23 105/11 106/4 | sub-Saharan [3] 34/15 64/7 64/24 |
| 80/10 135/3 188/16 190/22 194/12 195/11 | 107/18 130/22 130/23 131/20 212/12 | subethnic [1] 74/8 |
| 195/23 195/23 196/2 197/3 209/10 213/19 | 222/15 | subgroup [2] 74/11 86/24 |
| 217/1 222/5 223/23 224/4 224/6 226/4 | statements [1] 156/16 | subgroups [3] 73/21 74/18 86/21 |
| sort [26] 11/9 12/18 14/19 15/8 18/3 | states [66] 1/1 1/6 4/12 4/15 14/23 | subject [12] 4/14 11/16 11/19 11/20 12/4 |
| 18/7 20/9 22/16 23/2 33/4 36/19 36/19 | 14/24 24/7 24/10 30/15 32/7 32/16 33/11 | 12/21 15/12 69/7 84/22 124/21 145/16 |
| 37/9 37/16 38/22 38/24 39/1 41/11 51/10 | 49/4 49/14 64/7 64/10 65/8 66/10 66/18 | 160/1 |
| 134/23 150/3 152/5 158/7 162/2 181/19 | 69/21 73/14 74/22 75/1 75/17 77/20 78/3 | subjected [1] 22/14 |
| 226/21 | 78/10 79/1 79/10 79/16 82/4 82/14 83/6 | subjecting [2] 13/21 13/23 |
| sorts [1] 120/11 | 83/15 83/16 83/23 84/4 84/24 85/4 85/22 | submarines [5] 54/2 55/1 57/11 76/15 |
| sought [1] 217/17 | 86/1 86/2 88/3 90/3 90/4 91/16 107/14 | 115/18 |
| sound [2] 110/13 110/19 | 117/23 118/11 118/12 122/14 122/18 | submission [1] 206/21 |
| sounds [9] 73/13 110/9 112/16 130/3 | 189/18 189/23 190/4 190/5 190/9 190/12 | submissions [1] 128/1 |
| 130/5 181/6 191/6 217/18 222/22 | 190/20 191/3 191/10 191/13 191/15 223/20 | submit [2] 205/25 206/7 |
| source [9] 80/24 126/13 163/20 163/24 | 233/5 233/11 | submitted [3] 142/12 206/19 214/6 |
| 171/8 172/10 174/8 174/10 174/25 | States's [1] 76/4 | submitting [1] 148/8 |
| sources [12] 67/23 81/16 87/3 109/14 | stationed [1] 94/16 | subsequent [6] 76/10 171/3 171/11 173/23 |
| 115/9 155/25 156/22 157/6 157/8 166/16 | statistical [18] 9/4 45/12 45/13 51/3 | 185/11 214/7 |
| 167/25 212/12 | 51/5 53/24 57/4 138/5 138/6 149/22 156/8 | subsequently [2] 214/4 214/5 |
| South [6] 13/11 45/15 46/11 46/17 46/24 | 157/8 159/25 160/1 168/1 168/16 170/7 | subset [4] 105/19 147/17 155/16 156/12 |
| 48/11 | 211/12 | substantial [1] 76/19 |
| space [1] 97/17 | statistically [6] 20/14 50/3 50/5 57/9 | succeed [1] 106/3 |
| Spain [1] 134/7 | 59/9 167/1 | success [6] 17/4 19/4 20/10 20/16 109/24 |
| speak [3] 19/10 141/25 209/10 | statistics [8] 9/23 26/18 51/6 51/9 | 116/10 |
| speaker [1] 117/17 | 129/5 129/8 135/22 164/3 | successful [1] 99/20 |
| speaking [3] 41/8 43/11 125/6 | stats [2] 51/15 221/10 | succession [1] 13/16 |
| speaks [1] 49/10 | status [4] 167/17 175/6 217/9 219/8 | successor [1] 13/17 |
| Spears [1] 198/18 | statuses [1] 23/2 | such [10] 27/16 50/8 54/1 99/25 102/2 |
| special [4] 14/4 14/5 20/24 97/6 | statutorily [1] 92/20 | 121/20 121/20 145/24 159/19 208/23 |
| specialization [1] 16/4 | stay [3] 9/24 28/20 29/2 | Sudan [2] 13/10 13/11 |
| specialize [1] 135/16 | STEM [4] 174/15 218/16 218/16 227/17 | suffer [1] 6/22 |
| specialty [1] 43/9 | stenographically [1] 233/8 | suffered [1] 16/18 |
| specific [14] 15/16 88/7 88/9 88/13 | stenographically-reported [1] 233/8 | suffering [2] 10/1 13/5 |
| 92/23 97/15 136/15 156/13 156/19 169/20 | step [11] 3/22 88/19 136/21 148/24 | sufficient [1] 165/15 |
| 170/17 176/5 182/12 225/15 | 153/11 154/15 182/21 192/11 198/11 | suggest [3] 18/13 58/17 62/6 |
| specifically [22] 20/21 63/21 67/23 | 198/11 228/6 | suggested [2] 12/25 16/23 |
| 69/17 104/9 104/12 106/13 136/19 138/13 | Stephanie [3] 228/22 228/25 229/14 | suggesting [2] 34/20 130/24 |
| 143/2 143/4 148/3 149/18 164/9 165/3 | steps [4] 10/19 139/3 141/20 210/20 | suggests [6] 10/4 17/20 32/15 66/14 |
| 173/15 174/3 183/25 195/5 196/6 206/16 | stereotypes [1] 36/19 | 66/23 176/23 |
| 216/22 | still [14] 5/14 20/13 23/17 24/13 33/8 | suitability [2] 142/20 226/22 |
| specification [2] 138/12 167/2 | 39/6 39/10 91/15 101/3 110/18 128/11 | sum [4] 150/19 180/7 180/10 181/10 |
| specifics [2] 125/7 141/6 | 128/23 139/25 154/7 | summaries [1] 221/17 |
| speed [1] 18/11 | stipulate [1] 124/16 | summarized [1] 197/7 |
| spell [2] 89/16 133/12 | stock [1] 204/25 | summarizing [1] 28/13 |
| spelling [1] 3/7 | stoke [1] 85/22 | summary [7] 5/23 33/18 147/24 199/1 |
| spent [4] 190/17 199/2 199/9 204/14 | Stop [1] 199/5 | 199/7 222/8 225/5 |
| split [1] 54/17 | stopped [1] 42/22 | Sundberg [8] 228/22 228/24 229/6 229/9 |
| spoke [3] 141/22 142/2 196/11 | stops [1] 66/3 | 229/13 230/8 231/3 231/10 |
| spoken [1] 39/24 | Storm [1] 96/10 | Sunni [1] 38/1 |

| | | |
|--|---|--|
| S | tasks [2] 39/16 115/24 | 120/25 122/7 122/16 122/16 123/5 123/12 123/15 124/12 124/15 124/21 124/25 125/15 125/22 125/22 125/22 129/23 130/14 131/20 134/19 135/2 138/14 139/3 152/9 152/15 153/4 153/6 156/3 158/18 158/23 159/25 162/2 163/18 165/25 166/25 169/3 173/7 178/16 178/20 179/15 180/13 186/5 187/2 189/16 190/5 190/5 190/5 192/4 192/8 193/18 194/4 196/17 196/19 196/23 196/24 198/17 199/18 200/23 201/5 201/7 202/5 202/11 202/11 202/12 202/13 203/16 203/16 203/19 203/22 207/4 208/7 208/17 209/18 209/18 213/15 215/4 215/11 215/13 215/20 215/21 218/2 218/15 220/24 223/22 224/8 226/7 230/19 232/5 |
| Superintendent [2] 21/8 23/5 | Taylor [1] 160/17 | theater [1] 72/9 |
| superior [3] 14/11 96/1 113/8 | teachers [1] 119/9 | their [57] 4/15 8/19 10/15 12/14 12/16 13/13 14/7 15/5 21/3 23/4 35/14 49/11 49/16 51/6 56/2 62/11 62/13 64/12 64/13 65/10 65/17 65/18 65/19 70/3 70/6 70/7 70/14 78/16 83/12 83/15 85/10 86/23 109/21 117/5 117/21 119/15 120/14 120/19 125/12 125/13 126/9 147/22 150/22 161/10 161/16 161/18 164/5 173/4 185/18 187/5 207/19 209/20 209/25 210/2 210/3 212/24 215/20 |
| superiority [3] 77/13 77/15 77/24 | team [15] 3/18 10/21 10/22 82/9 87/12 103/1 114/3 120/12 120/13 142/3 191/7 191/14 191/21 198/7 231/5 | them [45] 4/8 6/4 6/14 10/25 12/24 13/24 14/3 14/5 18/9 21/7 23/14 23/18 24/22 28/17 31/15 39/2 39/13 49/1 65/20 66/2 69/12 95/23 100/20 101/4 103/18 109/20 119/16 119/19 119/19 120/19 121/8 121/16 122/9 125/13 125/14 125/23 127/24 128/3 207/15 226/1 227/1 227/24 227/24 229/16 230/7 |
| supervisors [5] 54/1 55/4 55/11 56/3 57/8 | teams [10] 10/20 18/7 18/17 19/15 38/6 40/10 111/14 120/10 120/20 121/6 | themselves [5] 21/6 87/3 106/21 117/4 117/9 |
| supplemental [1] 63/9 | teamwork [2] 40/10 104/13 | then [94] 4/8 5/2 6/1 6/18 9/14 9/19 10/22 11/4 12/19 18/17 22/13 24/14 31/5 32/13 34/8 36/3 37/5 38/2 46/16 46/20 47/2 47/6 59/8 59/14 60/10 63/25 64/6 64/25 65/4 66/1 66/2 67/5 67/7 69/1 69/16 76/22 81/6 88/24 91/23 91/23 94/10 95/3 96/2 98/12 99/17 105/19 109/22 111/4 111/6 115/24 128/23 138/24 139/6 141/2 142/6 148/17 151/8 154/1 158/5 160/10 162/4 169/24 173/21 176/8 176/10 176/11 176/13 176/17 177/8 177/10 177/17 178/12 180/16 192/18 193/5 206/8 206/17 206/22 207/11 209/18 210/2 210/6 211/15 216/21 216/24 218/4 222/23 229/15 230/18 230/18 230/21 230/23 231/14 231/16 |
| supported [2] 98/15 122/17 | technical [4] 106/1 149/17 169/13 169/15 | theoretical [1] 140/9 |
| supports [4] 17/15 61/2 61/3 108/16 | technological [4] 77/13 77/15 77/20 77/24 | theory [3] 30/17 30/19 87/7 |
| suppose [4] 41/4 161/11 161/12 161/15 | technology [7] 14/12 20/2 101/14 101/19 101/23 102/8 205/1 | there [126] 4/9 6/13 7/8 8/1 10/23 13/3 15/7 16/4 17/15 17/20 19/13 19/19 20/14 24/13 24/13 25/11 25/17 26/13 27/2 28/18 29/12 29/15 31/24 32/3 35/10 41/6 42/1 46/16 49/23 53/7 62/25 64/6 65/19 65/23 67/3 74/7 74/18 76/19 77/19 79/12 79/19 82/9 87/12 91/22 93/13 93/13 94/20 94/21 96/2 96/5 97/9 97/18 98/22 98/23 99/2 99/4 99/11 99/23 100/14 101/6 101/25 107/4 111/9 112/22 112/22 112/25 113/19 114/15 114/15 115/9 115/10 117/1 117/14 117/19 118/2 118/20 119/1 120/5 120/11 121/4 121/10 121/11 121/12 125/15 126/8 126/11 127/19 128/2 128/5 129/6 129/7 129/8 129/9 130/24 131/1 136/10 136/15 137/3 147/4 154/4 154/6 155/22 157/9 161/17 167/23 170/20 175/17 181/17 183/10 185/10 196/22 198/10 198/24 198/25 200/16 201/5 201/6 203/8 207/10 211/24 213/9 226/17 227/11 228/21 229/18 231/22 |
| supposed [4] 100/15 102/5 114/2 191/23 | tensions [1] 47/3 | there's [93] 3/19 7/4 11/9 13/16 14/25 18/3 18/13 19/21 20/9 22/10 34/12 34/20 35/12 37/24 45/2 46/8 47/23 49/13 51/9 51/25 55/10 60/8 74/1 81/5 81/9 88/13 91/17 91/23 96/2 98/13 98/18 99/8 99/12 99/17 100/9 111/9 115/14 115/15 115/15 115/21 118/18 118/22 126/3 126/8 128/1 128/14 128/15 128/25 137/18 147/1 148/19 150/18 151/10 151/13 153/3 154/7 154/11 154/21 154/22 154/24 155/1 157/21 160/6 161/15 162/5 163/25 172/2 172/4 174/19 177/10 179/3 181/9 183/25 184/5 184/18 184/19 186/14 188/7 188/13 188/14 194/1 195/2 197/13 201/4 206/16 208/8 209/23 209/24 221/13 225/12 226/4 226/23 227/4 |
| Supreme [2] 222/24 223/20 | term [4] 54/5 105/22 140/7 155/22 | therefore [9] 149/22 155/17 160/1 162/19 |
| sure [45] 3/25 11/2 11/7 18/3 19/2 25/18 40/18 41/5 42/3 50/25 52/8 55/19 66/5 73/19 77/14 85/11 99/20 100/19 105/4 106/8 106/10 106/11 107/15 107/16 109/21 109/23 110/11 111/22 117/20 125/20 134/11 163/6 168/10 201/19 201/19 217/19 224/3 224/10 224/12 225/1 225/6 225/9 230/23 231/5 231/13 | terms [59] 21/5 38/3 38/6 39/11 40/9 40/9 54/12 57/3 57/3 68/22 77/14 100/2 115/25 127/14 128/25 129/5 129/20 131/2 131/18 131/18 132/21 137/23 138/1 138/11 138/12 138/17 138/22 153/16 161/17 164/5 164/6 164/6 166/13 169/5 174/5 174/17 181/10 182/12 182/22 183/25 185/1 187/13 187/21 192/17 192/23 194/1 196/3 197/8 198/8 200/13 200/17 202/14 206/16 206/24 217/11 226/24 227/1 230/2 231/12 | |
| surface [9] 76/15 92/13 92/16 92/17 92/18 92/19 92/22 93/4 93/5 | test [2] 160/6 162/11 | |
| surprise [2] 18/14 18/16 | tested [2] 160/3 160/9 | |
| surprised [2] 114/6 117/19 | testified [20] 41/17 110/2 116/18 118/14 119/3 119/24 129/20 142/23 143/21 165/5 165/9 189/18 190/9 193/10 204/13 204/16 204/20 204/24 225/16 226/3 | |
| surprisingly [1] 100/24 | testify [9] 145/24 153/22 166/18 174/14 183/5 200/21 201/9 204/9 209/5 | |
| survey [14] 25/4 25/22 28/6 28/7 28/12 28/13 29/5 29/21 29/23 31/10 32/22 33/1 64/17 144/12 | testifying [7] 142/12 142/15 143/1 189/23 199/2 199/8 200/16 | |
| surveys [8] 24/18 24/21 25/1 29/24 31/23 62/6 82/10 126/20 | testimony [38] 23/8 44/12 57/14 67/12 78/7 79/8 83/3 83/5 84/21 88/20 126/17 126/20 126/23 128/16 141/16 142/13 142/15 146/16 147/1 152/20 153/14 154/1 164/22 166/12 174/4 189/22 200/9 200/20 201/8 201/9 205/23 210/15 212/6 212/25 213/8 213/12 228/7 230/12 | |
| survival [1] 23/19 | testing [2] 159/22 160/1 | |
| suspect [2] 131/14 131/15 | tests [1] 12/25 | |
| sustain [2] 98/20 104/2 | Texas [1] 124/18 | |
| swear [1] 133/8 | text [1] 103/23 | |
| Sweden [1] 64/3 | textbooks [1] 142/8 | |
| switch [1] 105/7 | than [49] 6/7 6/22 7/14 7/20 9/10 15/8 20/4 22/11 25/24 29/10 31/12 36/21 37/6 45/7 50/15 62/7 65/1 66/24 69/22 71/9 74/15 75/18 78/23 81/14 86/13 113/8 115/12 115/18 123/2 127/21 127/22 140/9 143/25 144/22 149/1 151/24 164/13 165/24 168/6 171/24 179/14 179/21 180/22 181/10 183/18 185/24 191/5 230/6 230/14 | |
| switching [1] 207/23 | thank [58] 3/13 5/7 5/21 8/24 15/15 20/17 21/11 26/16 28/24 29/18 30/11 33/16 40/12 40/14 41/10 49/24 53/4 54/20 86/6 88/16 88/19 89/12 89/15 89/20 103/19 103/20 122/21 123/5 127/5 127/9 132/6 132/7 132/8 132/14 133/16 133/18 135/3 145/25 146/1 147/6 188/16 188/17 188/19 189/6 198/18 200/11 203/24 204/1 204/11 211/20 213/22 226/9 228/1 228/2 228/9 228/10 231/25 232/8 | |
| SWO [1] 95/19 | Thanks [1] 126/14 | |
| sworn [4] 3/6 89/11 89/14 133/11 | that [1240] | |
| symbols [1] 21/10 | that's [180] 3/9 4/23 8/11 8/12 9/15 9/17 9/17 9/19 14/21 20/10 22/5 23/21 24/14 28/10 41/5 41/11 41/15 42/15 42/24 43/13 45/15 45/17 45/19 46/4 47/6 48/21 49/9 49/18 50/19 50/21 51/1 51/9 51/10 51/12 51/15 51/24 52/8 52/8 53/12 54/9 56/20 57/15 57/17 57/25 58/7 58/13 58/22 58/23 58/24 60/20 61/10 62/2 62/19 63/5 64/5 65/12 65/14 67/10 69/10 69/23 70/2 71/4 71/25 72/4 72/17 72/20 74/13 75/7 75/9 75/16 76/7 76/17 77/9 77/14 78/6 78/13 80/1 81/8 81/11 81/18 85/6 86/11 86/14 93/6 93/7 99/1 100/17 103/20 107/11 107/14 115/21 119/20 120/18 | |
| synphony [3] 110/8 110/12 110/21 | | |
| synchronized [2] 110/16 111/10 | | |
| system [11] 10/15 27/9 109/19 131/5 199/3 199/10 199/12 199/22 200/1 201/3 220/7 | | |
| systematically [1] 164/4 | | |
| systems [3] 45/6 77/16 111/6 | | |
| T | | |
| table [5] 5/11 5/12 5/23 157/20 225/13 | | |
| tactical [1] 106/1 | | |
| tactics [1] 14/12 | | |
| take [54] 4/2 4/4 8/14 13/9 14/24 18/1 20/18 22/1 24/24 25/10 26/7 26/17 28/15 30/12 32/7 32/13 33/17 37/4 40/18 41/10 48/20 54/16 60/1 70/18 70/20 76/12 76/25 86/9 86/13 87/1 88/23 105/7 116/16 117/21 118/25 120/19 122/3 136/6 153/11 154/15 159/10 169/19 174/13 183/1 185/2 187/17 188/20 188/24 211/11 212/19 230/4 230/18 230/20 231/15 | | |
| taken [6] 6/9 6/10 87/5 132/18 189/3 211/16 | | |
| takes [3] 162/10 164/21 184/23 | | |
| taking [6] 7/2 25/22 74/4 79/12 109/6 121/22 | | |
| talent [5] 104/13 104/20 106/2 106/23 117/8 | | |
| talented [2] 105/24 105/25 | | |
| talents [1] 231/11 | | |
| Taliban [2] 76/5 77/21 | | |
| Talibova [1] 35/16 | | |
| talk [19] 48/13 57/16 58/8 60/22 66/7 68/6 69/17 74/25 81/17 100/2 104/12 105/1 116/2 116/17 149/25 203/2 207/5 216/15 228/6 | | |
| talked [10] 7/22 19/25 28/5 39/19 85/3 110/1 112/20 117/17 120/25 211/21 | | |
| talking [18] 3/17 3/20 18/21 19/6 20/19 49/21 55/18 60/23 64/13 100/7 107/5 108/23 131/7 156/14 173/25 174/1 208/18 215/6 | | |
| talks [7] 46/20 48/15 55/7 61/23 64/6 64/16 105/14 | | |
| tank [1] 102/12 | | |
| tanks [1] 16/4 | | |
| task [4] 16/10 17/21 39/11 94/8 | | |

| | | |
|---|---|--|
| <p>T</p> <p>therefore [51] 169/2 168/3 200/2 175/18 213/11</p> <p>these [89] 6/17 6/19 8/5 8/10 8/13 8/19 8/21 8/22 9/4 9/7 9/23 10/5 10/8 10/11 10/18 11/5 14/4 17/24 18/21 22/1 22/17 23/7 23/24 23/25 24/3 24/4 24/6 24/14 27/5 28/16 29/25 33/11 36/15 37/10 38/3 38/23 39/4 39/5 39/12 39/17 48/13 50/19 50/22 54/12 55/5 55/11 57/2 60/13 65/5 74/2 83/10 87/4 87/7 95/1 95/12 103/17 112/13 113/21 115/24 120/5 121/22 141/3 146/21 146/25 146/25 148/22 151/15 152/1 156/4 156/22 157/8 158/4 159/24 168/18 174/22 175/16 179/11 184/21 192/22 202/1 212/16 213/1 213/2 213/2 221/17 221/17 227/24 230/4 230/25</p> <p>thesis [1] 138/25</p> <p>they [180] 4/7 4/11 5/1 8/15 8/17 10/14 12/10 12/13 12/14 12/24 12/25 14/7 14/9 14/12 14/18 15/5 15/12 15/13 18/8 18/9 18/10 19/10 19/10 21/1 21/2 21/3 23/2 23/15 23/16 23/17 23/20 23/20 23/22 26/21 27/1 27/7 28/1 29/6 32/6 32/8 32/10 32/18 35/19 35/19 35/21 36/3 36/25 37/1 37/2 37/25 38/1 38/4 38/5 38/5 40/1 42/1 45/7 47/13 48/2 48/2 51/6 51/6 55/17 55/17 64/18 64/25 66/2 66/20 68/3 69/16 70/3 70/5 76/15 83/16 85/18 87/4 87/5 87/9 99/7 99/8 100/2 100/8 100/9 100/11 100/14 100/14 100/14 100/15 100/16 105/4 108/3 108/24 109/21 110/13 111/10 111/15 111/15 111/16 111/17 111/22 117/6 117/7 117/9 117/18 117/20 119/10 119/15 119/17 119/18 119/21 120/14 120/15 120/17 120/18 120/19 120/19 121/17 121/17 124/22 124/22 125/2 125/8 125/18 125/22 126/3 126/4 126/9 126/9 126/11 126/12 126/13 128/20 128/22 128/23 130/10 130/10 160/18 160/19 160/21 160/22 161/12 161/24 164/4 164/14 172/20 174/6 176/8 176/8 176/10 176/11 176/12 177/6 177/11 177/14 181/13 182/6 183/1 184/9 185/2 191/8 191/10 191/12 195/6 209/13 209/18 210/3 210/10 210/11 210/18 210/24 210/24 211/9 211/11 213/3 213/6 215/19 225/24 225/25 226/2 226/6</p> <p>they'd [1] 65/19</p> <p>they'll [1] 126/10</p> <p>they're [37] 7/13 7/14 7/20 7/20 8/16 8/17 8/18 14/3 14/3 16/6 22/10 23/15 23/16 24/3 39/6 39/6 39/8 39/10 56/25 74/23 83/2 87/10 99/9 99/12 99/13 110/17 111/7 117/2 117/10 131/14 156/5 164/15 188/2 209/22 210/2 210/6 210/6</p> <p>thing [22] 10/9 22/25 23/11 31/14 51/15 111/2 115/5 115/20 117/3 119/20 120/2 120/13 120/25 121/2 124/24 125/13 125/14 125/18 150/14 163/25 214/17 216/2</p> <p>things [39] 8/4 10/15 12/3 15/6 16/5 17/8 19/16 22/19 23/24 23/25 34/24 35/7 36/23 40/25 55/24 90/14 96/3 101/16 105/3 107/6 109/6 112/10 112/13 114/4 114/8 115/10 118/18 118/19 120/11 121/13 202/1 204/6 209/8 209/13 210/2 210/6 210/7 211/24 211/25</p> <p>think [141] 3/20 8/25 17/24 20/1 20/20 21/10 21/24 22/4 23/13 23/14 24/6 24/21 24/21 28/10 28/15 31/20 39/6 41/3 41/17 42/25 44/12 45/2 47/21 50/15 51/6 52/23 56/8 56/15 56/24 56/25 57/2 68/17 69/17 70/2 71/18 78/7 78/13 80/1 80/2 80/3 80/5 80/8 81/7 81/25 88/6 96/3 97/16 98/10 98/17 98/17 99/10 99/16 99/22 100/2 101/14 101/15 101/25 102/8 108/1 108/25 109/2 109/9 110/6 113/4 113/7 114/13 114/21 114/23 114/24 115/3 116/6 116/9 116/11 118/3 118/22 119/20 120/21 121/3 121/23 123/19 124/25 128/16 129/7 129/17 133/2 133/6 135/5 137/25 138/10 139/3 144/4 146/10 148/15 149/4 149/21 150/14 150/19 156/22 157/11 158/16 159/12 160/8 163/10 163/24 163/25 165/5 165/9 180/12 181/21 181/23 183/22 190/5 191/14 192/3 192/18 193/22 194/4 196/23 197/6 197/13 197/22 203/17 205/7 205/7 205/9 205/10 205/14 206/14 206/17 207/23 208/13 208/15 209/7 213/17 214/4 221/23 223/21 227/4 229/6 230/4 230/6</p> <p>thinking [2] 161/20 231/14</p> | <p>third [12] 18/13 22/25 33/19 33/21 38/8 138/4 150/1 150/4 153/9 173/12 175/19 175/22 175/22 175/22</p> <p>thirds [1] 153/7</p> <p>this [446]</p> <p>THOMAS [6] 1/15 1/25 122/25 134/11 233/4 233/16</p> <p>Thomas's [1] 134/16</p> <p>those [82] 4/12 7/12 7/19 9/21 10/24 12/1 17/6 20/4 22/14 24/21 26/18 27/20 28/3 28/23 28/25 29/8 29/10 29/14 29/18 29/20 30/1 30/2 37/7 37/21 40/4 44/24 47/24 51/2 56/21 56/24 59/4 59/15 60/17 62/4 62/5 62/14 62/16 64/10 66/17 69/14 73/5 75/13 88/9 92/2 92/17 93/1 93/2 95/2 95/21 96/3 98/19 98/20 98/21 109/6 112/8 119/22 120/6 121/8 122/15 125/1 126/1 128/4 136/14 140/25 141/4 143/14 143/17 143/20 145/23 172/20 176/8 176/18 182/24 188/3 190/8 193/12 207/15 211/15 226/25 227/19 229/3 229/25</p> <p>though [1] 4/12</p> <p>thought [8] 18/4 64/18 64/25 91/2 91/4 113/15 115/2 230/16</p> <p>thousand [1] 87/24</p> <p>thousands [2] 87/24 191/17</p> <p>three [31] 8/19 15/8 27/10 36/13 64/4 82/10 83/10 86/11 88/12 88/14 90/7 90/8 91/19 91/20 91/22 93/13 94/19 96/11 103/10 117/20 117/23 119/10 135/18 137/18 152/1 182/13 184/5 189/22 190/1 190/7 211/25</p> <p>three-star [5] 90/7 91/20 117/20 117/23 119/10</p> <p>threshold [4] 87/12 87/14 174/19 174/23</p> <p>through [34] 6/18 7/3 18/1 22/1 27/20 27/23 36/14 36/20 37/10 43/19 50/20 56/4 67/13 80/2 90/18 92/6 93/9 95/23 109/22 112/3 114/21 115/3 116/9 116/11 121/9 126/2 128/11 128/20 128/24 132/12 134/13 192/15 211/24 216/23</p> <p>throw [1] 21/3</p> <p>throwing [1] 19/7</p> <p>Thursday [1] 231/17</p> <p>thus [1] 78/11</p> <p>tie [1] 167/14</p> <p>tied [1] 168/23</p> <p>time [61] 7/10 13/11 15/9 15/10 15/10 16/24 17/3 19/11 32/1 40/18 42/7 51/12 54/3 54/3 57/18 58/12 70/17 70/22 71/4 73/23 74/1 74/3 74/4 75/11 87/1 87/5 88/4 92/10 95/15 95/17 122/24 123/12 123/13 123/20 126/10 133/1 139/20 142/3 144/20 145/17 151/11 159/10 166/2 171/3 172/7 173/7 188/8 192/16 193/2 193/6 196/14 202/16 207/6 219/1 228/16 228/19 229/19 229/20 230/3 230/5 231/15</p> <p>times [18] 12/1 15/8 27/10 87/24 95/5 95/8 104/3 115/5 121/2 140/16 143/24 144/3 181/4 181/9 204/14 207/24 216/12 219/25</p> <p>tips [1] 37/20</p> <p>title [3] 99/7 107/7 134/3</p> <p>Title [2] [1] 99/7</p> <p>Title X [1] 107/7</p> <p>today [30] 13/10 24/7 30/15 30/18 33/20 34/21 39/19 44/12 79/1 79/8 79/16 83/3 83/6 83/8 83/14 83/19 83/22 84/5 84/7 102/3 106/23 118/1 136/8 146/16 170/3 170/25 188/25 207/15 210/16 215/8</p> <p>today's [4] 28/8 43/2 43/6 57/14</p> <p>Todd [1] 160/17</p> <p>together [16] 14/10 18/12 19/7 24/3 46/21 74/23 86/22 102/6 111/15 111/18 112/14 112/16 120/11 120/15 120/19 231/5</p> <p>Togo [1] 64/8</p> <p>token [1] 202/5</p> <p>told [6] 42/25 73/10 120/2 191/24 205/4 212/9</p> <p>Tomahawk [1] 115/12</p> <p>tomorrow [13] 106/22 132/22 132/23 132/24 133/5 170/4 228/13 228/14 229/4 229/25 230/12 230/25 231/15</p> <p>tone [1] 21/2</p> <p>too [14] 45/8 53/1 87/7 119/22 125/24 133/3 134/14 161/4 191/8 191/10 213/1 213/2 217/17 219/13</p> <p>took [2] 10/19 210/20</p> <p>tool [4] 136/4 136/14 140/5 143/4</p> <p>toot [1] 114/1</p> | <p>top [17] 9/8 9/12 9/25 25/13 28/22 28/23 61/15 63/9 71/16 71/23 73/6 93/3 95/24 103/12 103/12 106/5 121</p> <p>top-line [1] 25/13</p> <p>topic [4] 26/23 125/6 127/1 157/22</p> <p>topics [1] 29/24</p> <p>total [16] 26/1 42/1 92/7 100/21 180/24 193/20 195/18 196/15 199/1 199/2 199/8 199/9 199/13 209/20 230/3 230/5</p> <p>totally [1] 201/4</p> <p>tour [7] 93/19 93/22 98/2 98/4 100/22 100/24 100/25</p> <p>tours [3] 93/16 93/23 100/21</p> <p>toward [1] 38/7</p> <p>towards [1] 166/25</p> <p>TRACEY [1] 1/22</p> <p>track [1] 71/7</p> <p>tracked [1] 130/9</p> <p>tracking [1] 35/16</p> <p>tracks [1] 81/24</p> <p>traffic [3] 132/10 132/13 132/25</p> <p>train [4] 98/20 106/19 107/7 220/2</p> <p>trained [2] 10/22 101/20</p> <p>training [4] 34/25 35/8 112/11 116/8</p> <p>transaction [1] 19/9</p> <p>transcript [2] 233/8 233/9</p> <p>transformational [1] 182/22</p> <p>transitions [1] 74/2</p> <p>translates [1] 181/14</p> <p>treat [2] 81/13 116/11</p> <p>treated [3] 82/16 87/9 87/10</p> <p>treating [2] 4/8 68/25</p> <p>treatment [4] 45/3 68/24 69/3 69/5</p> <p>treats [1] 68/21</p> <p>tremendous [1] 24/10</p> <p>trend [2] 26/5 88/10</p> <p>trial [16] 1/3 1/9 50/4 50/6 50/11 88/21 174/9 186/7 194/11 194/14 200/8 200/13 203/7 205/13 214/2 228/8</p> <p>tribal [1] 13/19</p> <p>trident [1] 97/11</p> <p>tries [1] 112/16</p> <p>trigger [1] 127/13</p> <p>troops [1] 66/17</p> <p>trouble [2] 134/17 228/19</p> <p>true [24] 42/15 49/9 49/18 58/7 62/19 68/3 69/10 69/23 74/13 75/9 76/14 76/17 77/14 78/13 87/5 131/9 158/9 165/22 193/18 208/17 211/7 218/15 226/7 233/7</p> <p>trust [8] 14/3 22/25 23/2 23/3 23/6 23/8 23/10 65/15</p> <p>truth [1] 184/25</p> <p>try [5] 32/13 113/23 123/4 167/14 216/1</p> <p>trying [26] 12/4 12/5 13/22 24/11 36/24 37/9 38/24 80/6 86/12 106/8 107/13 109/7 117/2 117/8 117/12 130/17 139/7 148/4 148/11 148/13 152/23 158/25 180/2 196/3 197/8 210/19</p> <p>Tuareg [3] 63/14 63/19 63/20</p> <p>tunnel [3] 134/12 134/17 134/23</p> <p>turn [23] 5/8 6/25 15/16 17/14 21/12 23/18 36/5 52/9 59/10 103/4 139/14 147/23 149/15 150/1 150/11 162/22 167/3 169/11 174/24 175/19 179/23 182/2 186/18</p> <p>turned [1] 94/9</p> <p>turning [1] 178/6</p> <p>turns [2] 15/6 78/20</p> <p>Turo [1] 107/3</p> <p>Turo's [1] 105/11</p> <p>two [39] 4/5 4/18 8/19 10/25 12/12 15/7 27/10 39/24 65/19 90/12 92/1 96/25 104/14 107/8 112/21 113/21 115/14 118/18 124/25 137/4 137/18 153/7 167/10 172/21 176/15 177/13 189/22 190/1 190/2 190/7 207/2 207/5 228/21 228/23 229/25 230/4 230/6 230/7 230/25</p> <p>two-star [1] 96/25</p> <p>two-thirds [1] 153/7</p> <p>twos [1] 24/2</p> <p>type [10] 59/2 92/23 93/2 96/13 109/10 118/9 131/5 131/18 145/16 161/23</p> <p>types [1] 140/11</p> <p>typhoid [1] 13/16</p> <p>typically [10] 16/1 16/2 16/3 27/9 28/1 28/2 82/10 83/17 87/1 87/15</p> |
| | | <p>U</p> <p>U.S [27] 24/17 34/21 34/24 38/11 51/17 52/1 53/6 94/18 116/3 116/16 121/15 121/19 121/21 122/4 122/10 122/12 127/16</p> |

U
U.S... [10] 127/20 229/12 158/25 144/24 142/4 147/13 183/17 203/9 220/21 222/14
U.S.C [1] 233/7
Uh [2] 46/15 64/9
Uh-huh [2] 46/15 64/9
Ukraine [1] 39/10
ultimate [1] 217/21
ultimately [1] 175/12
UN [28] 36/23 37/9 60/18 61/24 62/3 62/7 62/10 62/16 62/22 62/24 63/13 63/19 63/22 63/25 64/11 65/1 65/7 65/18 66/9 66/11 66/15 66/18 67/8 67/21 67/25 121/10 121/24 122/17
unable [1] 114/22
unaccounted [1] 156/4
unaccounted-for [1] 156/4
unafraid [1] 115/10
unbiased [3] 62/7 62/13 62/22
UNC [1] 226/3
uncertainty [2] 16/9 40/5
under [9] 58/15 83/6 99/7 106/13 121/10 142/5 145/11 179/2 206/2
undercuts [1] 22/8
undergraduate [4] 41/18 41/24 134/6 135/10
undergraduates [1] 41/20
underlying [9] 131/7 137/23 138/1 143/11 149/21 154/23 170/8 195/7 196/17
undermines [1] 21/22
underneath [1] 95/19
underreport [2] 26/19 26/21
underrepresented [3] 175/6 175/7 219/8
understand [26] 56/9 67/15 79/11 84/21 100/9 100/12 127/15 127/25 128/7 128/7 132/22 139/4 146/20 147/12 150/18 192/2 194/7 194/9 199/19 201/22 202/3 203/4 203/4 213/9 226/17 230/10
understanding [22] 102/7 102/8 102/14 107/4 108/6 121/2 121/11 127/18 130/14 143/11 184/2 195/3 195/4 195/9 195/12 196/5 196/7 196/20 197/18 198/5 198/9 218/5
understate [1] 158/15
understated [3] 157/23 159/4 159/6
understating [1] 158/9
understood [8] 85/11 100/8 100/14 100/15 192/3 193/24 196/12 202/6
undervalued [1] 47/25
underway [1] 111/8
undisclosed [2] 193/11 193/13
unequal [5] 6/17 7/4 7/18 16/17 34/18
unethical [1] 50/13
unfavorable [1] 10/2
uniform [8] 91/19 92/10 92/11 95/19 96/5 97/9 97/18 106/21
uniformed [1] 16/1
uniforms [1] 120/14
union [9] 15/2 69/22 70/10 70/13 70/18 71/9 71/16 72/2 73/23
unique [8] 104/21 109/7 109/8 110/22 125/1 172/17 225/12 226/24
unit [17] 14/4 27/14 30/7 99/25 102/2 102/5 108/15 110/3 110/5 110/20 110/22 111/14 111/21 111/24 112/12 112/18 115/13
UNITED [59] 1/1 1/6 14/23 14/24 24/7 24/10 30/15 32/7 32/16 33/11 49/4 49/14 73/14 74/22 75/1 75/17 76/4 77/20 78/3 78/10 79/1 79/10 79/16 82/4 82/14 83/6 83/15 83/16 83/23 84/3 84/11 84/24 85/4 85/22 86/1 86/2 88/3 90/3 90/4 91/16 117/23 118/11 118/12 122/14 122/18 189/18 189/23 190/4 190/5 190/9 190/12 190/19 191/3 191/10 191/13 191/14 223/20 233/5 233/11
units [9] 6/13 7/24 14/5 28/1 38/3 50/10 60/15 60/23 102/2
unity [3] 110/16 110/17 110/17
university [7] 11/23 126/13 131/13 134/6 134/8 135/11 205/22
Unlike [1] 140/3
unlikely [1] 65/9
unlimited [1] 137/16
unobservable [3] 160/23 161/23 169/24
unobservables [5] 159/23 159/24 161/4 163/8 175/16
unobserved [1] 168/19
unpack [4] 149/14 150/25 180/16 182/8
unrealistic [2] 184/2 185/3

unreasonable [1] 163/13
unrelated [1] 143/15
unreliable [1] 143/15
unreliable [1] 149/24
unrestricted [2] 92/14 92/15
unscripted [2] 112/3 114/19
until [4] 83/21 188/25 230/18 230/20
unusual [2] 114/25 116/13
unwelcoming [1] 28/2
unwilling [1] 26/24
unwillingness [1] 29/1
up [56] 5/10 6/21 8/6 9/2 9/19 21/13 24/1 25/11 26/11 27/23 28/17 31/6 33/3 41/18 41/20 44/11 44/19 45/22 46/5 55/21 56/15 61/11 62/6 64/17 69/18 71/12 79/18 81/15 82/7 91/12 103/17 104/12 117/6 117/21 127/13 128/10 130/13 133/1 136/21 148/24 159/2 159/17 164/15 167/14 174/20 182/21 198/1 198/4 198/13 198/21 201/1 202/9 205/14 216/3 217/20 228/18
update [1] 83/18
updated [1] 221/10
upon [4] 78/15 78/20 195/8 195/16
upset [1] 51/16
urban [3] 1/22 38/16 130/7
us [30] 5/23 13/9 22/1 23/22 32/2 38/9 93/9 103/25 106/1 108/17 109/9 117/13 154/3 158/24 159/2 165/16 184/12 223/22 230/5 231/24
USA [1] 120/14
use [38] 6/3 6/14 12/14 15/13 17/6 23/22 43/18 43/22 44/1 44/7 51/6 51/15 65/14 67/16 79/9 81/12 83/2 84/22 85/1 85/7 88/4 107/13 121/3 125/17 138/11 138/14 138/15 140/4 140/7 143/10 169/14 183/7 209/15 226/15 227/14 227/20 231/4 231/11
used [16] 36/21 80/22 81/18 136/20 137/12 137/13 143/4 143/20 145/13 170/8 175/14 175/18 182/24 207/24 218/13 223/10
uses [2] 37/19 61/23
using [12] 5/12 7/3 9/14 10/12 24/3 32/22 42/22 82/13 122/5 122/7 143/2 210/15
USNA [1] 202/24
USS [8] 93/12 93/14 93/19 93/22 94/2 96/9 101/10 121/14

V

validate [1] 95/2
validity [1] 161/8
valuable [1] 173/24
valuation [1] 204/24
value [12] 4/13 4/16 4/24 5/3 22/11 31/15 31/20 32/23 51/6 81/7 81/10 204/25
valued [1] 48/2
values [4] 5/25 32/13 82/11 219/25
Valuing [1] 45/23
Vandegrift [1] 93/12
variable [16] 20/10 152/23 155/2 155/4 155/23 159/22 163/2 164/1 165/16 165/23 166/19 167/21 168/3 169/5 175/9 184/24
variables [6] 136/25 138/13 167/23 184/19 184/20 185/2
variation [3] 172/17 187/23 188/10
variations [1] 188/3
varied [2] 140/14 144/20
varies [2] 97/6 166/1
variety [15] 73/8 136/13 136/24 140/2 164/2 173/20 173/22 173/22 187/2 217/11 217/15 217/22 218/2 218/11 226/23
various [7] 6/1 17/5 74/7 77/5 93/10 95/21 140/25
vary [2] 211/1 219/1
varying [1] 78/12
vast [1] 181/22
vastly [1] 101/20
Vazirani [1] 27/20
verbal [1] 196/22
verbally [2] 196/6 196/11
verifying [1] 5/18
version [6] 32/12 79/25 83/21 137/2 143/19 203/13
versus [9] 29/13 30/5 41/24 74/20 74/20 110/18 110/21 116/7 126/12
very [62] 4/17 16/10 16/10 19/20 29/18 29/20 33/1 33/13 34/12 35/12 38/24 39/12 39/17 40/14 51/16 69/1 69/8 69/12 74/15 100/3 100/16 103/19 110/17 111/16 111/19 111/20 112/6 112/6 112/8 119/14 121/12

122/19 124/12 124/15 127/5 132/14 138/22 151/16 152/2 152/6 153/25 161/9 163/13 165/16 167/17 167/18 180/20 181/24 187/6 196/10 198/2 199/5 200/4 200/11 218/16 222/5 225/11 226/24 228/9 230/8 232/8
vessel [1] 99/15
vested [1] 204/25
vice [6] 84/3 84/8 84/8 89/8 90/6 91/22
Vietnam [2] 43/1 43/5
Vietnam-era [2] 43/1 43/5
view [27] 26/21 61/1 68/14 69/25 108/2 108/21 115/11 115/17 130/16 131/23 132/1 132/4 153/20 153/21 157/24 158/8 158/9 160/2 160/24 164/18 171/16 172/23 196/16 197/8 230/11 231/23 232/1
viewing [1] 4/9
viewpoint [1] 106/22
viewpoints [1] 18/15
views [1] 114/20
Vincent [1] 89/18
Vinson [2] 94/16 101/11
violated [1] 170/9
violates [2] 215/7 216/18
violation [2] 193/13 193/14
violence [9] 4/15 6/14 9/14 13/22 13/24 23/18 35/23 37/3 37/19
violent [3] 36/21 38/16 81/9
Virginia [1] 203/10
visible [1] 93/5
visit [3] 101/7 121/5 141/24
visits [1] 120/3
vitae [1] 189/20
voice [3] 121/19 122/10 122/13
voir [1] 145/21
volunteer [9] 46/13 117/1 117/12 117/13 129/23 129/24 131/3 131/9 131/11
volunteering [1] 117/10
volunteers [1] 119/15
vs [1] 1/5
vulnerable [1] 35/7

W

wait [2] 134/23 201/14
waive [1] 201/15
walk [3] 7/3 90/18 93/9
Walker [1] 94/7
walking [2] 36/20 131/15
want [49] 9/24 15/23 17/14 46/8 53/22 58/10 58/15 59/18 60/13 61/1 63/13 66/5 68/6 74/25 75/22 81/17 90/18 90/25 92/6 93/23 93/23 103/12 104/9 104/12 105/14 106/9 106/12 110/1 114/1 114/5 116/17 119/15 119/18 122/23 127/12 139/14 146/3 162/12 182/16 182/17 202/21 207/5 211/19 215/19 216/15 220/13 222/9 228/11 231/13
wanted [6] 8/9 12/14 48/2 79/15 117/20 131/4
war [45] 14/25 15/11 16/23 20/9 22/22 30/23 31/1 34/1 34/4 34/8 35/18 35/22 36/1 36/1 37/4 37/5 37/8 38/11 39/2 39/9 39/18 69/18 70/17 70/20 70/21 70/23 70/25 71/2 71/16 72/6 73/7 74/10 76/8 76/8 77/10 77/25 86/22 88/7 88/7 92/4 92/17 129/7 129/9 129/10 231/9
War I [1] 36/1
War II [1] 129/7
wardroom [2] 114/3 115/23
warfare [11] 16/2 39/3 39/15 92/13 92/16 93/4 93/5 97/3 97/4 100/11 115/5
warfighting [5] 103/11 103/25 104/3 104/17 106/24
wars [2] 75/24 77/5
warship [5] 121/15 121/19 121/21 122/4 122/10
warships [1] 92/22
wartime [1] 29/25
was [223] 11/2 11/14 11/18 11/20 11/21 12/10 13/9 13/11 16/17 17/4 18/21 18/23 26/4 28/12 32/12 32/17 35/6 41/17 41/20 43/3 46/11 46/16 48/24 53/1 62/10 64/20 65/3 65/10 65/10 69/21 73/10 75/7 75/10 77/21 79/12 84/8 86/25 87/5 87/12 87/15 91/1 91/1 91/2 91/3 91/14 91/22 92/5 93/4 93/12 93/12 93/13 93/14 93/15 93/17 93/17 93/19 93/20 93/20 93/22 93/22 93/25 94/4 94/6 94/8 94/10 94/11 94/14 94/15 94/17 94/17 94/20 94/21 94/22 94/24 96/8 96/10 96/16 96/19 96/20 96/21 97/12 97/16 100/5 100/6 100/7 100/22

W
would... [57] 30/25 31/1 31/5 31/11 31/17 31/17 32/21 32/22 32/24 32/25 33/11 33/13 35/6 39/18 40/2 40/8 42/4 42/11 42/13 42/21 43/18 44/22 50/13 51/4 51/6 51/14 51/16 56/22 57/2 58/1 64/14 65/9 65/17 65/18 65/20 66/2 66/24 67/5 67/8 68/8 69/16 69/20 70/5 70/6 70/19 70/21 70/23 71/6 71/8 73/7 73/18 73/19 73/20 74/5 74/7 74/17 76/9 76/11 77/3 77/8 77/9 77/23 78/2 78/10 79/4 79/16 80/24 81/13 81/16 83/17 84/25 85/1 85/8 85/13 85/17 85/21 86/1 87/4 87/7 87/8 87/11 87/15 88/4 88/10 92/19 99/23 100/3 100/8 100/10 100/16 101/4 101/5 101/25 102/15 103/18 113/6 113/6 116/5 116/15 117/21 122/7 123/1 124/5 124/9 124/13 124/17 125/2 125/3 125/11 125/18 130/22 130/22 131/12 137/13 137/20 142/11 144/20 144/21 145/15 146/21 146/23 150/23 151/5 155/7 161/20 168/7 177/15 179/14 180/4 182/17 183/7 184/3 184/6 184/10 184/11 184/16 185/1 186/3 186/10 186/21 187/1 187/7 194/19 195/17 200/6 200/18 204/5 208/10 208/22 208/22 208/24 209/8 209/13 209/14 210/8 210/11 210/18 210/21 210/24 210/24 210/25 215/3 217/20 218/20 219/16 226/19 230/6
wouldn't [4] 88/12 88/14 125/20 125/21
wow [3] 51/4 119/22 205/20
write [3] 12/17 53/24 100/16
writes [1] 63/23
writing [2] 42/6 197/5
written [1] 196/22
wrong [3] 102/18 216/2 226/14
wrote [8] 12/12 41/15 42/6 45/9 54/14 67/10 186/2 208/3
WYRICK [5] 1/16 2/9 122/22 123/10 132/3

X

Xavier [1] 84/19
XO [1] 93/19

Y

Yale [3] 41/3 41/19 42/7
YANG [1] 1/18
Yang's [1] 203/15
Yankees [1] 124/22
Yard [1] 90/2
Yeah [15] 8/3 30/21 49/24 52/19 52/22 61/1 73/22 87/1 146/25 184/17 192/10 194/4 203/1 223/22 225/24
year [17] 26/5 82/10 83/11 83/12 83/21 90/21 136/9 139/18 142/10 165/24 172/1 188/4 188/7 193/4 219/18 225/11 225/12
years [34] 36/18 37/5 37/6 37/7 37/8 38/12 41/4 41/7 41/22 41/23 70/19 91/6 92/9 92/10 92/10 93/13 101/2 101/13 101/15 101/24 102/1 109/18 113/13 123/14 129/11 134/2 138/3 140/12 140/19 180/21 185/25 188/2 212/7 212/8
years '23 [1] 212/7
years '25 [1] 212/8
Yep [2] 147/3 198/24
yes [421]
yesterday [7] 3/17 10/20 16/23 18/20 23/8 27/19 53/17
yet [4] 24/13 41/5 80/15 214/8
York [2] 124/20 125/4
you [895]
you'd [7] 71/11 100/16 115/16 121/8 121/8 121/14 190/11
you'll [17] 3/3 3/5 7/18 10/6 89/10 96/2 97/1 97/2 97/3 111/5 111/18 132/22 133/8 204/1 206/7 229/13 229/15
you're [93] 4/17 6/1 6/23 10/5 19/6 20/12 33/19 34/3 34/18 35/4 38/22 38/24 47/16 50/8 50/19 51/1 54/22 57/22 68/1 68/25 80/12 80/21 81/12 85/12 85/16 85/20 85/25 88/21 93/6 99/20 103/17 108/23 111/8 111/9 112/3 112/5 112/5 112/9 112/10 112/13 113/22 113/23 113/23 114/18 114/25 115/6 115/8 115/10 116/14 116/25 116/25 118/17 120/6 121/24 121/25 122/2 122/12 124/24 132/25 134/22 136/7 139/7 139/23 147/7 163/15 166/24 173/25 174/1 181/4 191/23 193/7 193/18 196/8 204/8 204/8 204/10 208/18 210/10 211/15 211/22 212/22 224/10 224/12 224/23 225/1 225/6 225/9 228/7 228/10 229/18 231/4

231/11 231/15
you've [37] 20/19 22/7 39/5 41/1 42/14 50/8 50/11 50/11 51/10 53/10 53/11 115/7 115/9 123/13 123/25 128/15 140/12 140/19 146/16 159/12 160/8 165/5 166/23 173/13 175/4 189/18 190/9 193/5 204/13 204/16 204/20 204/24 208/25 209/4 225/16 225/19
younger [1] 130/8
your [366]
yours [3] 65/24 65/25 222/9
yourself [2] 29/21 119/1

Z

zero [10] 31/17 31/20 32/24 131/15 150/19 166/25 180/6 180/10 181/10 207/3
zero-sum [1] 150/19
ZIP [3] 166/5 166/5 167/11
zones [1] 95/12
zoom [1] 75/22
zoomed [1] 44/19